This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

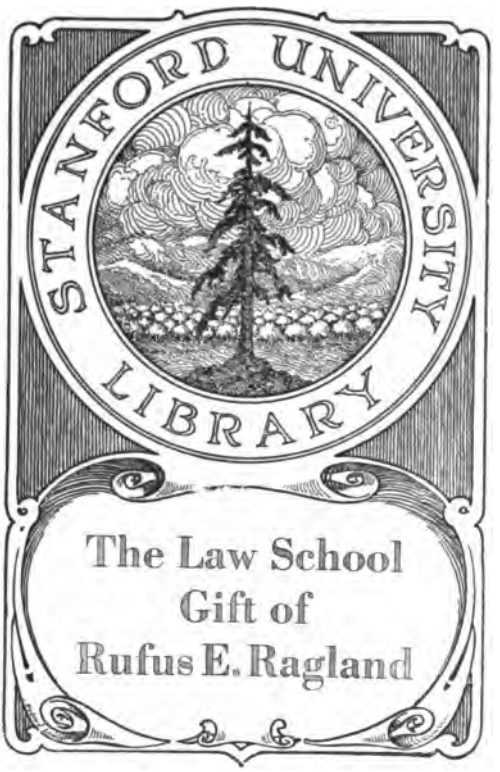
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`


STANFORD UNIVERSITY
LIBRARY
The Law School
Gift of
Rufus E. Ragland

S
CT
ALP
TJ74

THE LAW OF PARTNERSHIP, ETC.

A TREATISE

ON THE

LAW OF PARTNERSHIP,

INCLUDING ITS

APPLICATION TO COMPANIES.

FOURTH EDITION.

BY

THE HON. SIR NATHANIEL LINDLEY, KNT.

ONE OF THE JUDGES OF HER MAJESTY'S HIGH COURT OF JUSTICE.

ASSISTED BY

SAMUEL DICKINSON,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

EDITED AND ANNOTATED BY

MARSHALL D. EWELL, LL. D.

IN TWO VOLUMES.

VOL. I.

CHICAGO:
CALLAGHAN & COMPANY.
1881.

Entered according to Act of Congress, in the year 1881,
BY CALLAGHAN & COMPANY,
In the Office of the Librarian of Congress, at Washington, D. C.

STANFORD LIBRARY

Stereotyped and Printed by
THE CHICAGO LEGAL NEWS COMPANY.

EDITOR'S PREFACE.

THE English edition of Lindley on Partnership has long enjoyed an enviable reputation with the Profession; and only the fact that no American edition has been published in many years, and the high cost of the English edition, have prevented its securing the place in the libraries of American practitioners which its great value deserves. In order to supply what is believed to be a felt want, this edition is presented to the Profession. The English law of partnership, from which we have derived the greater part of our American law upon this subject, is more exhaustively treated by our author than by any other; and in the preparation of this edition it has been the aim of the Editor to present in the notes the substance of the American law upon the subject of partnership down to the time of going to press. It has been thought inadvisable to publish in this edition the chapter upon the English Bankruptcy Act, and also the latter part of the second volume pertaining to the winding up of companies under the English statutes, there being no corresponding legislation in this country. To have included them in this edition would have rendered necessary a third volume, thereby largely

increasing the cost of the book to the practitioner without any corresponding benefit. In their place a chapter has been inserted upon American unincorporated joint-stock companies, which it was thought would be of more value to the American practitioner than the matter omitted.

The Editor desires, in this connection, to acknowledge his obligation to Mr. Adelbert Hamilton, of the Chicago Bar, for valuable assistance in reading the proof, verification of the cases cited, and in the preparation of the Table of American Cases.

UNION COLLEGE OF LAW,
CHICAGO, May 3, 1881.

MARSHALL D. EWELL.

AUTHOR'S PREFACE.

THE present work is the result of an attempt to investigate the Law of Partnership, and to determine the extent to which its principles are applicable to Companies.

With this view, the author has first examined the principles which govern ordinary partnerships, and has then endeavored to trace the manner in which those principles have been applied to the various kinds of companies known to the English law. This method is the key to the arrangement of the work, which is, in fact, a treatise not only on the Law of Partnership in its ordinary acceptation, but also on the Law of Companies, in so far as the last has any connection with the first.

The Statutory Law of Partnership was long in a state of transition; but this state may be said to have terminated when the Companies act, 1862, was passed, consolidating, repealing and amending most of the statutes then in force relating to Joint-Stock Companies. Nevertheless, some knowledge of these statutes, and of the decisions upon them, is indispensible to the proper understanding of Joint-Stock Company Law. No apology, therefore, is felt to be needed for the reference in the present volume to decisions which, although relating directly to statutes now repealed, have also

an important bearing on the general Law of Partnership in its application to companies.

The Companies acts, 1862 and 1867, and the rules promulgated under their provisions by the English Court of Chancery, are printed in an appendix, together with the act of 1877; and, to facilitate reference to them, an index to their sections and clauses is inserted immediately before the general index, with which the work concludes.

It must always be borne in mind, that in order to determine any legal question relating to companies, it is indispensable to attend closely to the language of the statutes by which they are governed; and although for convenience, the substance of various statutory enactments has been shortly stated in the text, the reader is warned not to rely on these abridgments, but to consult the statutes themselves in every case which he may have to investigate.

Great pains have been taken to render this Edition deserving of the favorable reception accorded to those which have preceded it. The Judicature acts and rules have rendered it necessary to re-write those portions of the work which relate to actions at law and suits in equity (Bk. II, c. 3, and Bk. III, c. 10), and this has accordingly been done. The whole treatise has moreover been carefully revised throughout; whatever is obsolete has been omitted, or if retained, as being still useful, has been printed in small type; and many portions besides those above mentioned have been re-written and adapted to the most recent decisions.

Notwithstanding, however, the labor bestowed upon the work, and the anxiety of the author to render it a trustworthy guide to the subject to which it relates, the multiplicity and difficulty of the questions with which he has had to deal, are

such that he dare not venture to hope that he has always avoided error, or that his work is free from serious faults; and although it has engaged his unremitting attention for many years, he is painfully aware that it is, at best, but an imperfect production.

It only remains to add, that in the preparation of this edition the author has been again assisted by his friend and former pupil, Mr. Samuel Dickinson, who has not only revised the sheets in passing through the press, and prepared the indexes, but has examined the decisions on many of the most difficult subjects, and has thus greatly diminished the author's labors, and contributed to the utility of the work.

WESTMINSTER HALL,
8 May, 1878.

ANALYSIS OF CONTENTS.

[The references are to the marginal pages.]

	PAGE
EDITOR'S PREFACE	v-vi.
AUTHOR'S PREFACE	vii-ix.
AUTHORITIES CITED	xxv.
INTRODUCTORY	1—14
BOOK I.—OF CONTRACTS OF PARTNERSHIP, THEIR CREATION AND DISSOLUTION	15—235
BOOK II.—OF THE RIGHTS AND OBLIGATIONS OF PARTNERSHIPS AND COMPANIES AS REGARDS NON-MEMBERS	236—539
BOOK III.—OF THE RIGHTS AND OBLIGATIONS OF THE MEMBERS OF PARTNERSHIPS AND COMPANIES BETWEEN THEMSELVES	540—1038
BOOK IV.—OF THE WINDING UP OF PARTNERSHIPS; [AMERICAN JOINT STOCK COMPANIES]	1039—1099
INDEX	1100

INTRODUCTORY.

1. Meaning of the word partnership 1
2. Distinction between partnerships, corporations and companies . . . 4
3. Historical sketch of the law relating to companies 5
   Table of statutes now in force relating to partnerships and companies . . 11
4. Different sorts of partnerships and companies 12

BOOK I.

OF CONTRACTS OF PARTNERSHIP, THEIR CREATION AND DISSOLUTION, 15—235.

CHAP. I.—THE NATURE OF THE CONTRACT DETERMINED 15
Preliminary observations 1

SECT. 1.—Of true partnerships 18
1. Partnership is the result of an agreement to share profits and losses 18
2. Partnership is *primâ facie* the result of an agreement to share profits although nothing may be said about losses, and although there may be no common stock . . . 19
3. Partnership is *primâ facie* the result of an agreement to share profits although community of loss is stipulated against 22
4. Partnership is not the result of an agreement to share gross returns 24
5. Partnership is not the result of an agreement which is not concluded 26
6. Partnership is not the result of an agreement to share profits so long as anything remains to be done before the right to share them accrues 27
Application of this principle to
Ordinary partnerships 27
Joint-stock companies 31
SECT. 2—Of *quasi*-partnerships 33
By sharing profits 33
Of the doctrine that persons who share profits are liable for each other's acts, as if they were partners 34
1. State of the law anterior to Cox *v.* Hickman. . 34
2. Modifications introduced by Cox *v.* Hickman . 38
3. The act of 28 & 29 Vict. c. 86 43
By holding oneself out as a partner 47
Persons who hold themselves out as partners incur the liabilities of partners 47
SECT. 3.—Of sub-partnerships 54
SECT. 4.—Of general and particular partnerships 55
SECT. 5.—Of clubs and societies not having gain for their object . . 56
SECT. 6—Of co-ownership as distinguished from co-partnership . . . 58
Note on the remedies between co-owners. 63

CHAP. II.—OF THE CONSIDERATION OF A CONTRACT OF PARTNERSHIP . 70
Of the return of premiums 71

CHAP. III.—OF THE PERSONS CAPABLE OF ENTERING INTO PARTNERSHIP . 76
SECT. 1.—Of their number 76
SECT. 2.—Of their capacity 77
1. Aliens 78
2. Felons and outlaws 80
3. Infants 80
4. Lunatics 83
5. Married women 84
6. Corporations and companies 86

CHAP. IV.—Of the Evidence by which a Partnership or Quasi-Partnership may be proved 87
The Statute of Frauds 87
The fact to be proved 90
The means of proving it 91

CHAP. V.—Of the Formation of Companies, and of the Evidence by which a Person is proved to be a Shareholder 99
Sect. 1.—As to companies generally 99
1. Agreements to take, and allotment of shares . . 100
2. Effect of the prospectus 106
3. The return of subscriptions to companies . . 117
4. Scrip 123
5. Membership, especially where prescribed formalities have not been observed 124
6. Registers of shareholders and certificates of title to shares 138
Sect. 2.—As to different classes of companies 146
Class I. Cost-book mining companies 146
Class II. Companies incorporated or privileged by the crown, viz:—
1. Chartered companies 150
2. Companies formed under the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73 . . 152
Class III. Companies incorporated or privileged by some special act of Parliament:—
1. Companies not incorporated, but, empowered to sue and be sued . . . 154
2. Incorporated companies 154
Class IV. Companies incorporated or privileged by a general act of Parliament:—
1. Banking companies formed under 7 Geo. 4, c. 46 161
2. Registered companies 163
Companies formed and registered under the Companies act, 1862 . 168
Companies registered under the Companies act, 1862, but not formed under it . . . 176

CHAP. VI.—Of Illegal Partnerships and Companies. . . 180
Sect. 1.—What partnerships are illegal :—
In general 181
By particular statutes, and herein of
Bankers 184
Brokers 187
Insurers 187
Medical practitioners 188
Patentees 189

Pawnbrokers 189
Solicitors 190
Theatrical managers, &c 191
Unincorporated Joint-Stock companies with transferable shares 191
SECT. 2.—Consequences of illegality. 197
Especially as regards
the right to recover back subscriptions 197
the sale of shares 198
actions by and against strangers 199
actions between the partners 200

CHAP. VII.—OF THE GENERAL NATURE OF A PARTNERSHIP . . . 206
SECT. 1.—Of the mercantile and legal notion of a firm 206
SECT. 2.—Consequences of the non-recognition of the firm as distinguished from the persons composing it 208
Generally as regards its name 208
In legal proceedings 211
As regards sureties and securities, and in particular of the effect produced on them by a change in the firm 212
SECT. 3.—Difference between partnerships and companies in the foregoing respects 216

CHAP. VIII.—OF THE DURATION OF A CONTRACT OF PARTNERSHIP, AND OF THE CAUSES OF ITS DISSOLUTION 218
SECT. 1.—Of partnerships at will and for a term 218
SECT. 2.—Of the causes of the dissolution of an ordinary partnership . 220
1. The will of any partner 220
2. The impossibility of going on, in consequence of—
The hopeless state of the partnership business . . 222
Insanity 224
misconduct and destruction of mutual confidence . 227
3. The transfer of a partner's interest 229
4. Death 231
5. The occurrence of some event which renders the continuance of the partnership illegal 232
SECT. 3.—Of the application of the foregoing doctrines to companies . 232

BOOK II.

ON THE RIGHTS AND OBLIGATIONS OF PARTNERSHIPS AND COMPANIES AS REGARDS NON-MEMBERS, 236—539

CHAP. I.—OF THE LIABILITIES OF PARTNERSHIPS AND COMPANIES FOR THE ACTS OF THEIR AGENTS 236
SECT. 1.—General principles of agency as applied to ordinary partnerships 236

SECT. 2.—General principles of agency as applied to companies . . . 240
1. What persons are agents of companies 240
(a) In the process of formation 240
(b) After their formation 243
directors 244
agents who are not directors 246
2. Authority of agents of companies 249
(a) of acts which are altogether *ultra vires* . . 249
(b) of acts which are *intra vires*, but irregular . . 253
(c) of ratification by companies 258
SECT. 3.—Liability of partnerships and companies in respect of acts which are neither torts nor frauds 264–297
and herein of the implied powers of partners and directors in matters relating to
1. Accounts 264
2. Admissions 264
3. Agents 265
4. Amalgamation 265
5. Arbitration 265
6. Bills of exchange and promissory notes . . 266
7. Bills in parliament 269
8. Bonds 269
9. Borrowing money 269
10. Cheques 274
11. Contracts 275
12. Debentures 275
13. Debts 275
14. Deeds 278
15. Distress 279
16. Extension of business 279
17. Guarantees 281
18. Insurances 283
19. Interest 283
20. Judicial proceedings 283
21. Leases 283
22. Mortgages and pledges 284
23. Notice 287
24. Payments 290
25. Penalties 590
26. Purchases 290
27. Receipts 393
28. Releases 293
29. Representations 294
30. Sales 295
31. Servants 296
32. Shares 296
33. Ships 296
34. Transfer of business 297
SECT. 4.—Liability of partnership and companies in respect of torts and frauds 297

1. Torts 298
2. frauds 301
Liability of partnerships for the misapplication of money by their members 302
Liability of partnership for the false representations of their members 314
Liability of companies for the frauds of their directors 317
SECT. 5.—Liability of partnerships and companies in respect of acts which are unauthorized, and are known so to be . . . 325
1. As regards partnerships 325
2. As regards companies 334
SECT. 6.—Effect of the form of a contract on the liability of partnerships and companies in respect of contracts not entered into on their behalf, or not so in proper form 336
1. As regards partnerships and unincorporated companies 336
1. Contracts under seal 337
2. Ordinary contracts not under seal 337
3. Bills of exchange and promissory notes . . 340
Bills in the name of the firm 341
not in the name of the firm . . . 344
Promissory notes 348
2. As regards companies, and herein of the proper form of the contracts of companies 352
the rule requiring the contracts of corporations to be under seal 352
of the statutory exceptions to that rule . . 356
SECT. 7.—Liability of partnerships and companies in respect of contracts not binding on them, but of which they have had the benefit 361

CHAP. II.—OF THE NATURE, EXTENT, AND DURATION OF THE LIABILITY OF INDIVIDUAL MEMBERS OF PARTNERSHIPS AND COMPANIES TO CREDITORS 365
SECT. 1.—Nature of the liability 365
1. As regards contracts 365
A. Persons who are liable 365
B. Of the doctrine that partners are liable severally as well as jointly for partnership debts 369
2. As regards torts 373
SECT. 2.—Extent of the liability 375
1. At common law 375
of attempts to limit liability, and especially by pledging the partnership funds only 377
2. By statute 382
SECT. 3.—Duration of the liability 385
1. Commencement of liability 385
A. In ordinary partnerships 385
liability of firm for acts preceding its formation . 386
liability of incoming partners for debts contracted before they join the firm 389

B. In companies 394
liability of companies for the acts of their promoters 395
2. Termination of liability . . . . . .
A. In ordinary partnerships 403
a) As to future acts 403
without notice of dissolution 404
Death 404
Bankruptcy 405
Retirement of dormant partners . . 405
by notice of dissolution or retirement . . 406
the effect of such notice 408
when there is a continued holding out notwithstanding the notice . 409
with reference to the doctrine that a partnership, though dissolved, subsists so far as is necessary for the winding up of its affairs . 411
what amounts to notice 415
and herein of the distinction between old customers and other people 415
b) As to past acts 417
and especially by
1. Payment 418
of the appropriation of payments . . 419
where there is a single current account 422
where there are several distinct accounts 427
2. Release 433
3. Substitution of debtors and securities . 435
by agreement 435
A *a*. Where a retired partner has not been discharged, no new partner having been introduced 438
A *b*. Although a new partner has been introduced 441
B. Where a retired partner has been discharged . . . 443
by the doctrine of merger . . . 450
and herein of the effect of taking fresh securities for an old debt.
4. Lapse of time and the statutes of limitation 453
B. In companies 459

CHAP. III.—Of Actions between Partnerships and Companies and Non-Members 466
Sect. 1.—Of actions by and against partners 466

1. Where no change in the firm has occurred since the right accrued 475
A. Actions in respect of legal rights 475
a) Actions by the firm 475
Actions *ex contractu* 475
Actions *ex delicto* 480
b) Actions against the firm 482
Actions *ex contractu* 482
Actions *ex delicto* 485
B. Actions in respect of equitable rights 485
2. Where a change in the firm has occurred since the right accrued 486
SECT. 2.—Of actions by and against companies 492
1. Incorporated companies 492
2. Companies empowered to sue and be sued 495
3. Unincorporated companies 500
SECT. 3.—Of set off 502
1. by and against partnerships 503
2. by and against companies 511
SECT. 4.—Of execution against partnerships and companies and their members for the debts thereof 515
1. Against partners 515
2. Against companies and their shareholders 517
Execution against the company 518
Proceedings against shareholders upon a judgment obtained against a company or its public officer . . . 520
Proceedings by *sci. fa.* generally 523
Execution against members of companies governed by
7 Geo. 4, c. 46 531
7 Wm. 4 & 1 Vict. c. 73 535
8 & 9 Vict. c. 16 536
other companies 539

BOOK III.

OF THE RIGHTS AND OBLIGATIONS OF THE MEMBERS OF PARTNERSHIPS AND COMPANIES BETWEEN THEMSELVES, 540, 1038.

CHAP. I.—OF THE RIGHT TO TAKE PART IN THE MANAGEMENT OF THE AFFAIRS OF PARTNERSHIPS AND COMPANIES . . . 540
SECT. 1.—Of Partnerships 640
SECT. 2.—Of Companies 541
Directors and their powers 541
Shareholders and their powers 544
The constitution and management of companies governed by
8 & 9 Vict. c. 16 552
the Companies act, 1862 558

CHAP. II.—Of the General Duties of Partners and Directors to observe Good Faith, and not to exceed their Authority 569
Sect. 1.—Preliminary remarks 569
Sect 2.—of the obligation of partners, promoters, and directors, not to benefit themselves at the expense of their co-partners and shareholders 571
1. As regards partners 571
2. As regards companies 580
a) in process of formation 580
duties of promoters 580
b) companies formed 587
duties of directors, and of their position as trustees 587
Sect. 3.—Of the powers of majorities 598
when a minority must give way to a majority . . 598
when a minority is entitled to control the majority . 600
applications to Parliament, &c,, for power to change the constitution of a company 606
invalid unanimous resolutions 608

CHAP. III.—Of the Capital of Partnerships and Companies, and of its Payment by Calls 610
Sect. 1.—General observations on the capital of partnerships and companies 610
1. Capital of partnerships 610
2. Capital of companies 611
varying the amount of capital 612
the division of capital into shares 613
nominal and paid-up capital 613
increasing capital 615
statutory enactments relating to the capitals of particular kinds of companies 616
Sect. 2.—Of calls 623
1. The persons by whom calls can be made 624
2. The purposes for which they can be made . . . 625
for starting the company 625
for carrying on the business of the company . . 626
3. The manner of making calls 629
the resolution making a call 630
the notice that a call has been made 632
4. The persons liable to pay calls 634
Subscribers 634
Shareholders 635
Representatives of subscribers and shareholders . . 640

CHAP. IV.—Of Joint and Separate Property 642
Sect. 1.—Of joint estate 643

SECT. 2.—Of separate estate 648
SECT. 3.—Of the conversion of joint estate into separate, and *vice versa* 654

CHAP. V.—OF SHARES IN PARTNERSHIPS AND COMPANIES 660
SECT. 1.—Of the nature of a share and the rules which govern its devolution in case of death 660
the doctrine of non-survivorship between partners . . 664
the doctrine that shares are personal estate . . . 667
SECT. 2.—Of the amount of each partner's share 675
the presumption in favor of equality 675
the application of this presumption to shares in companies 678
SECT. 3.—Of the lien which each partner has on the property of the firm, and on the shares of his co-partners 679
the lien of ordinary partners 679
the lien of companies on the shares of their members . 684
the lien of shareholders on the shares of each other . 684
SECT. 4.—Of the mode in which a share is taken in execution for the separate debts of its owner 687
In the case of partnerships 687
the duty of the sheriff 688
the position of the purchaser from the sheriff . . 690
the position of the execution debtor 691
In the case of companies 694
Charging orders under 1 & 2 Vict. c. 110 . . 694
SECT. 5.—Of the transfer of shares 697
In ordinary partnerships 697
In companies 701
Blank transfers 705
Forged transfers 707
SECT. 6.—Of sales of shares, and questions arising thereon . . . 710
1. Sales not on Stock Exchange; and herein of
vendor's obligation 712
purchaser's obligations 713
fraudulent sales 716
sales by auction 718
actions between buyer and seller 718
2. Sales on Stock Exchange; and herein of the position
1. Of the vendor and of the broker or jobber who agrees to buy from him 723
2. Of the vendor and the ultimate purchaser . . 725
3. Of the vendor and undisclosed and intermediate purchasers 728
4. Of the vendor and purchaser as regards their respective brokers 730
SECT. 7.—Of the relinquishment of shares and of the right to retire . 735
the right of a partner to retire from the firm . . . 735
the right of a shareholder to surrender his shares . . . 736
SECT. 8.—Of the forfeiture of shares and of the right to expel . . . 744

the right to expel a partner 744
the right of a company to forfeit shares 745
under 8 & 9 Vict. c. 16 746
the Companies act, 1862 747

CHAP. VI.—Of Contribution and Indemnity with Reference to Partnerships and Companies 753
Sect. 1.—General observations 753
Foundation of the right to contribution 753
Of the right of agents and trustees to indemnity from their principals and *cestuis que trustent* 755
Of the right of partners and directors to indemnity by the firm or company 759
The German Mining Company's case 760
Of some former differences between contribution at law and in equity 768
Of contribution between wrongdoers 770
Of contribution between directors *inter se* 773
Sect. 2.—Of compensation for trouble 774
Sect. 3.—Of outlays and advances 777
Sect. 4.—Of debts, liabilities, and losses 781
Sect. 5.—Of interest 786

CHAP. VII.—Of the Division of Profits and of Dividends . . . 790
payment of dividends out of capital 792
preference shares 796

CHAP. VIII.—Of the Accounts of Partnerships and Companies . 800
Sect. 1.—Of the mode of keeping partnership accounts 800
Sect. 2.—Of the duty to keep and the right to inspect them . . . 807
In ordinary partnerships 807
In companies 809
Sect. 3.—Of false and fraudulent accounts 814

CHAP. IX.—Of Partnership Articles and Companies, Regulations . 817
Sect. 1.—General observations 817
Partnership articles are not intended to define all the rights and duties of partners 817
Partnership articles are to be construed
with reference to the objects of the partners . . . 818
and so as to defeat fraud 819
and to prevent unfair advantages 819
Any clause, however express, is capable of being abandoned by the tacit consent of all the partners . . 820
Articles of partnership are presumed to apply so long as the parties to them remain partners 822
Sect. 2.—Of directory and imperative clauses 824

SECT. 3.—On the usual clauses in articles of partnership, and especially of those relative to
1. The nature of the business 830
2. The time of the commencement of the partnership . . 831
3. The name and style of the firm 832
4. The duration of the partnership 832
5. The premium 832
6. The capital and property of the firm 832
7. Interest, allowances, &c. 836
8. Conduct and powers of the partners. 837
9. Partnership books 838
10. Accounts 838
11. Retiring 840
12. Dissolving 843
13. Expelling 844
14. Valuation of shares 846
15. Transmission of shares and introduction of new partner 851
16. Annuities to widows 853
17. Prohibitions against carrying on business . . . 854
18. Good-will 859
19. Getting in debts 865
20. Assignment of share by retiring partner . . . 866
21. Indemnities 867
22. Arbitration clauses 868
23. Penalties and liquidated damages 871

CHAP. X.—OF ACTIONS BETWEEN PARTNERSHIPS AND COMPANIES, AND THEIR MEMBERS, AND BETWEEN THE MEMBERS THEMSELVES 872
SECT. 1.—General observations 872
1. Law before the Judicature acts 872
Legal proceedings between partners 872
The effect of incorporation 873
The effect of enabling a company to sue and be sued by a public officer 873
Legal proceedings between unincorporated and unprivileged companies and their members 874
2. Effect of the Judicature acts and herein of
a) Actions by and against the firm 877
b) Actions by and against some on behalf of others . 877
SECT. 2.—Parties to actions between partners and shareholders
1. General rule as to partnership actions 877
2. Where some partners may sue and be sued on behalf of themselves and others 880
3. Actions by and against public officers 891
4. Actions by and against incorporated companies . . 892
SECT. 3.—Cases in which Courts will not interfere between partners and shareholders 893

1. Of the rule not to interfere except with a view to a dissolution 894
2. Of the rule not to interfere in matters of internal regulation 895
3. Of the rule not to interfere at the instance of those who have been guilty of laches 902
SECT. 4.—Actions for specific performance 914
contracts of partnership 914
other agreements between partners 917
agreements to take shares 919
SECT. 5.—Actions for misrepresentation and fraud 923
1. General observations 923
2. Actions for damages 926
3. Actions for rescission of contract 927
contracts between ordinary partners and their representatives 927
contracts to take shares in companies 935
SECT. 6.—Actions for dissolution, account, &c. 943
1. Of account and discovery 944
a) Of account and discovery generally . . 945
as to account 945
as to discovery and production of documents 955
as to payment into court 960
b) The defenses to an action for an account and discovery 961
Denial of partnership 961
The Statute of Limitations 963
Account stated 967
Award 970
Payment and accord and satisfaction 971
Release 971
c) The decree for a partnership account . . . 972
Just allowances 974
The period over which the account is to extend 974
accounts of profits accrued since dissolution 976
The evidence upon which the accounts are to be taken 991
2. Of injunctions 993
against partners 994
against directors, &c. 1000
3. Of receivers 1005
4. Of the sale of partnership property under the decree of the court 1015
SECT. 7.—Other miscellaneous actions 1019
1. Between persons who have agreed to become partners. 1019
2. Between partners 1022
Note on the law as it stood before the Judicature acts 1024

3. Between companies and their shareholders . . . 1032
Actions for calls 1033
Actions for dividends 1035
Mandamus 1036

BOOK IV.

OF THE WINDING UP OF PARTNERSHIPS; [AMERICAN JOINT-STOCK COMPANIES] 1039—1099.

General consequences of a dissolution of partnership
As regards the creditors of the firm . . . 1039
As regards the partners themselves 1040

CHAP. I.—Of Death and its Consequences 1044
Sect. 1.—As regards the surviving partners and the executors of the deceased 1044
1. In the case of ordinary partnerships 1044
2. In the case of companies 1048
Sect. 2.—As regards joint creditors 1050
1. In the case of ordinary partnerships . . . 1050
1. With reference to what occurred before death . 1050
And herein of the liability of executors of deceased partners to creditors of the firm
2. With reference to what has occurred since death 1059
And herein of the effect of a trust to employ assets in the business of the firm
2. In the case of companies 1064
And herein of the liability of executors of deceased shareholders to the creditors of companies
Sect. 3.—As regards the separate creditors, legatees, and next of kin of the deceased 1066
Of the rights of the separate creditors and legatees, &c., of a deceased partner, generally 1066
When the share of the deceased is not got in 1070
When shares are specifically bequeathed 1075

CHAP. II.—American Joint Stock Companies 1083
Sect. 1.—As unaffected by statute 1083
Sect. 2.—As regulated by statute 1087
General index 1100

AUTHORITIES REFERRED TO BY THE AUTHOR.

[Those pages in which a case is particularly referred to in the text, and is not merely cited, are in the following list denoted by an asterisk.

The cases in each sheet have been brought down to the latest possible moment. It ought, however, to be mentioned, that no attempt has been made to collect cases decided since the establishment of the Law Reports, and not reported therein.

An attempt has been made to collect under the name of each company the cases reported in connection with its winding up; but the references to those cases will be found, not under the name of the company, but under the names of the persons to whom they relate; for owing to the way such cases are frequently reported, it has been found impossible to make complete lists of them under the names of their respective companies.]

[The references are to the marginal pages.]

PAGE

Abbott *v.* Rogers 168
v. Smith 376, 515
Abel *v.* Sutton . . 408, 409, 412
Abercorn's (Marquis of), case 104, 543
Aberdeen Rail. Co. *v.* Blaikie . 590
Abraham *v.* Hannay 881, 882, 887, 891
Accidental and Marine Insurance Co. *v.* Mercati 493
Acerro *v.* Petroni 98
Acland *v.* Lewis 673
Adair *v.* New River Co. . . 502
Adams' case (13 Eq.) 104, 741, 742
Adams *v.* Bankhart 265
v. Bingley 289
v. Great Western Railway Co. 79
Adamson *v.* Jarvis . . 755, 771
Addams *v.* Ferick . . 1048, 1079
Addinell's case 104
Addis *v.* Knight 505, 945, 1045, 1054
Addison *v.* Mayor of Preston . 519
v. Overend 480, 481
v. Tate . . 524, 525, 526
Adelphi Hotel Co., see Best's case
Adley *v.* Whitsable Co. 548, 605, 795*, 900*, 992, 1001
Agace, *ex parte* . . 294, 316*, 329
Agar *v.* Athenæum Life Assurance Society 252, 255*, 262, 272, 279, 355, 829
v. Fairfax 65
v. Macklew 868
Aggs *v.* Nicholson 268, 351*, 357, 366

PAGE

Agra and Masterman's Bank *ex parte* (6 Ch.) . . . 829
v. Hoffman 504
See Anderson's case
Waring, *ex parte*
Agriculturist Cattle Insurance Co. *v.* Fitzgerald . 164, 637
See Baird's case
Belhaven's case
Brotherhood's case
Bush's case
Dixon's case
Smallcomb's case
Spackman's case
Stanhope's case
Stewart's case
A. G. *v.* Borrodaile 67
v. Brunning 672
v. Burges 299
v. Great Northern Railway Co. 494, 601, 605, 608, 1001
v. Higgins 661, 675
v. Mayor of Norwich 757, 1002
v. Rees 957
v. Siddon 298, 299
v. Weeks 299
v. Wilson 770, 772
Airey *v.* Borham . . . 75, 775*
Ajacio *v.* Forbes 479
Akhurst *v.* Jackson . . 72, 74
Albert Life Assurance Co. (9 Eq.) 380, 282
(6 Ch.)

PAGE

Albion Steel and Wire Co. *Re, v.* Martin . . 585*, 587, 591
Albretcht *v.* Sussman . . 78, 79
Alchorne *v.* Saville . . 377, 382
Alcock *v.* Taylor 218
Aldebert *v.* Kearns . . . 292
v. Leaf 380
Alder *v.* Fouracre . . 574, 949, 996
Alderson *v.* Clay . . 94, 550
v. Pope 48*, 237, 327, 332*, 333
Aldham *v.* Brown . 120, 121*, 634
Aldred *v.* North Midland Railway Co. . . . 398
Aldridge *v.* Cato 383
Alexander, *ex parte* (1 Gl. & J.) 215
v. Barker 477
v. Simms . . . 67, 684
v. Worman 378
Allard *v.* Bourne . . . 248, 292
Allen *v.* Graves . . 724, 728, 729
v. Kilbre . . 997, 1041
v. Sea Fire and Life Assurance Co. . 268, 351, 357
Allfrey *v.* Allfrey . . 965, 968
Allison *v.* Herring 502
Alloway *v.* Braine 906
Allsop *v.* Wheatcroft . . . 857
v. Rowley . . 1066, 1069
Ambergate, &c., Railway Co. *v.* Coulthard 631
v. Mitchell . 612, 613*, 616, 624, 633
v. Norcliffe 631
Ambler *v.* Bolton . 651, 833, 1018
Ambrose *v.* The Dunmow Union 353
v. Kerrison 758
Amory *v.* Delamirie 298
Amsinck's case. See Spottiswoode's case
Anchor Assurance Co. (5 Ch.) . 464
Anchor Insurance Co.'s case (2 J. & H.) 464
Anderson *v.* Anderson . 229, 843, 895
v. Maltby . 658, 736, 931
v. Wallace 993
v. Weston 407*
Andrews and Alexander's case . 57
v. Ellison 379
Andrewes *v.* Garstin . . . 1019
Angas's case 85
Angelo, *Re* 663, 705
Anglesea Colliery Co. . . 807
Anglo-Australian, &c., Assurance Co. *v.* British Provident Life, &c., Soc. 255, 283, 292, 819, 919
Anglo-Californian Gold Mining Co. *v.* Lewis 547
Anglo-Danish and Steam Navigation Co.
See Sahlgreen and Carrall's case

PAGE

Anglo-Danubian Steam Navigation and Colliery Co. (20 Eq.) 619
See Walker's case
Anglo-Danubian Co. *v.* Rogerson 493
Anglo-French Porcelain Co. *v.* Harris 143
Anon. (1 Camp. 492) . . . 843
(2 K. & J. 441) . 224, 226, 227, 994, 999
(1 Madd. Ch. 144) . . 969
(12 Mod. 446) 275
(2 Str. 696 1036
v. Harrison 962
v. Layfield 278
Ansell *v.* Baker . . . 451, 452
v. Waterhouse . . . 485
Antram *v.* Chace 265
Apperley *v.* Page . 882*, 952, 953, 954
Appleton *v.* Binks 337
Apsey, *ex parte* . . 311*, 362
Arbuckle *v.* Taylor . . 299
Arden *v.* Sharpe. . . . 329
v. Tucker 478
Arlington *v.* Meyrick . . 213
Armitage *v.* Winterbottam . 283
Armstrong *v.* Armstrong . 180, 201, 202
v. Burnet . . 641, 1050, 1079
v. Lewis 189
Arnold *v.* Bainbridge . . . 506
v. Mayor of Poole . . 353, 494
Arthur *v.* Lamb. 66
v. Midland Railway Co. . 140
Arton *v.* Booth 293*
Ashbury Rail. Carriage Co. *v.* Riche 170, 250, 251*, 252*, 259, 559
Ashby *v.* Blackwell . . . 301
v. James 966
Ashley's case 924
Ashpitel *v.* Sercombe . . 119, 120
Ashton *v.* Lord Langdale . . . 674
Ashurst *v.* Fowler 597
Ashurst *v.* Mason . 595, 596, 597, 754, 760, 771, 773, 774
Ashworth's case 514
v. Stanwix 299
Askew's case . 150, 151, 172, 173
Aslatt *v.* Farquharson . . . 514
Aspinall *v.* London & Northwestern Railway Co. . 230, 277, 294, 486, 691
Astle *v.* Wright 75
Astley *v.* Johnson 470*
Aston, *ex parte* . 124, 194, 196, 710
Athenæum Life Assurance Society, *in re* . . . 378, 380, 381
See Durham's case
Eagle Insurance Co.
Prince of Wales' Assurance Society

PAGE

Athenæum Life Assurance Society, *in re*
Sheffield's case
v. Pooley . 252, 255, 258, 260 262, 272, 255, 364* 514, 818*
Atkins *v.* Tredgold . . . 457
Atkinson *v.* Grey . . . 1079
v. Laing 488
v. Mackreth . . 303, 486
v. Pocock . . 120, 121
Atkyns *v.* Kinnear . . 858, 871
Atwood *v.* Munnings . . . 266
v. Rattenbury . . . 476
Attwool *v.* Attwool 503
Atwood *v.* Maude . . . 74, 75
Atwool *v.* Mereweather . 548, 885, 886, 887, 896, 897, 899, 900, 902
Aubert *v.* Maze . . 183, 188, 201, 771, 784
Aubin *v.* Holt . . . 182, 190, 918
Ault *v.* Goodrich . . 414,* 455, 964
Aulton *v.* Atkins 866
Aunand *v.* Honiwood . . . 666
Austen, *ex parte* 329
v. Boys . . 853, 858, 864*
Austin *v.* Guardians of Bethnel Green 352, 354
Australasia Bank *v.* Harding & *v.* Nias 154
Australia, Royal Bank of. See Royal Bank of Australia
Australian Auxiliary Steam Clipper Co. *v.* Mounsey . 270, 279, 286, 599, 608, 614, 622
Australian Steamship Co. . . 492
Aleling *v.* Knipe 58
Averall *v.* Wade 754
Avery *v.* Langford . . 857, 871
Ayers *v.* South Australian Banking Co. 250
Aylesbury Railway Co. *v.* Mount 638*
v. Thompson . . . 441, 638
Ayers *v.* South Australian Banking Co. 250

Baboo Janokey Doss *v.* Bindabun Doss 878
Bachurst *v.* Clinkard 688
Backhouse *v.* Hall . . 213, 214
Bagge, *ex parte*, or Bagge's case 710, 742
Baglehole, *ex parte* 79
Bagnall *v.* Carlton 583
Bagnalstown and Wexford Rail. Co. 271
Bagot *v.* Easton 927
Bagshaw *v.* The Eastern Union Railway Co. . . 117, 250, 605, 608 884, 885, 1001

PAGE

Bagshaw *v.* Parker 226
ex parte 292, 606
Bahia and San Francisco Railway Co. 135, 145, 173, 301
Bailey *v.* Bidwell 327
v. Birkenhead, etc., Railway Co. . 627, 886, 898,* 1003
v. Ford . . . 224, 1018
v. Macaulay 242
v. Universal Provident Life Assurance . 126, 136, 141
Baily's case, or *ex parte* (5 Eq. & 3 Ch.) . . . 103, 114,* 173
case or *ex parte* (15 Jur.) 746
Bain *v.* Whitehaven Rail. Co. 140, 157 158
Baird's case . . 405, 640, 1066
Baird *v.* Planque 50
v. Ross . . 117, 120, 121
Baker's case (7 Ch.) 83
(1 Dr. & Sm.) 272, 357, 553, 762,* 764, 780
Baker, *ex parte* (3 DeG. & S.)
v. Charlton 344*
v. Martin 1068
v. Plaskitt . . . 101, 710
v. Sutton 674
Baldney *v.* Ritchie 483
Baldwin *v.* Lawrence . . 809, 887
Bale *v.* Cleland . 324, 792, 794, 926
Balfour *v.* Ernest . . 252,* 258
Ball *v.* Dunsterville . . . 278
v. Lanesborough . . . 362
Ballam *v.* Price . . . 418, 434
Balmain *v.* Shore . . 648, 671, 852
Balsh *v.* Hyam . . . 756, 759
Bangor *v.* Portmadoc Slate Co. 618, 797
Bank of Australia *v.* Abrahams . 271
Bank of Australasia *v.* Breillat . 270
v. Harding . . 154, 495
v. Nias . 154, 451, 495, 521
Bank of England, case of, (3 D. G. F. & J.) . . 649, 650,* 657
v. Anderson . . . 185
v. Booth 185
v. Johnson . 141, 163, 533, 534
Bank of Hindustan, China, and Japan *v.* Alison . 106, 134,* 292, 293
See Campbell's case (9 Ch.)
Higg's case
Hippesley's case
Los' Case
Martin's case (2 H. & M.)
Mitchell's case
Swan's case
Bank of Ireland *v.* Evans's Charity Trustees . . . 279, 301
Bank of London *v.* Tyrrell, 585, 586, 587
Bank of London, &c., Ins. Association 165

PAGE
Bank of Scotland *v.* Christie 215, 425
v. Fenwick . . . 524
Bank of Turkey *v.* Ottoman Co. . 593
Banks *v.* Gibson . . 862, 863, 999
v. Parker 887
Banwen Iron Co. *v.* Barnett 163, 178, 637
Barber, *re* (15 Jur.) 105
re or *ex parte* (5 Ch.) 806, 821 839, 840, 847, 848, 850
& Co., *re* (9 Eq.) . . . 360
v. Barber 963
Barclay's case, or *ex parte* (26 Beav.) 124 194, 701, 705, 710
v. Lucas 213
v. Wainwright . . . 1080
Barden *v.* Keverberg 84
Bardwell *v.* Sheffield Waterworks Co. 792, 793
Barfield *v.* Loughborough . . 787
Barfoot *v.* Goodall 416
Bargate *v.* Shortridge 133, 138,* 542, 637, 703, 875
Baring's case . . 304,* 313, 315 370, 375, 1052
Baring *v.* Corrie . . 509, 721
v. Dix 223*
Barker *v.* Allan . 282, 368, 743, 1025
v. Buttress 1065
v. Goodair 690
v. Lyndon 242
v. Richardson . 293, 294*
v. Stead 242
Barklie *v.* Scott 19*
Barnardiston *v.* Chapman . . 1025
Barned *v.* Hamilton . . . 719
case (18 Eq.) 742
Barnett *v.* Lambert . . 31, 242
Barnewall, *ex parte* . 312, 313, 1073
v. Sutherland . . 498, 499
Barrett's case (2 Dr. & Sm. and 3 D. G. J. &. Sm.) 104, 319, 320
Barrett *v.* Blunt 242
Barron *v.* Fitzgerald . . . 209, 210
Barrow, *ex parte* (2 Rose) 54*, 657, 879, 946,
Barry *v.* Croskey . . 323*, 710
v. Nesham 36
v. Stevens 877
Bartlett *v.* Lambert 1021
v. Pentland 520
v. Vinor 184
Barton's case . . 606, 745, 746
v. Trusts 1080
Barton *v.* Hanson . 339, 387, 648
v. Hutchinson . . 397, 492
v. Williams 67, 236, 285, 1025, 1031*
Barwick *v.* English Joint Stock Bank 321

PAGE
Bass *v.* Clive 208
Bassett *v.* Wood 451
Batard *v.* Douglas 32
v. Hawes . 32, 769, 1022, 1029
Bate, *ex parte* (3 Deac.) . . 452
v. Robins 787
v. Mayor of Ashton 279, 281, 1002
v. Mid. Wales Railway Co. 268
v. Pinder 458
Bates, *ex parte* 81
v. Mackinley 1081
v. Gosling 433
Battersby *v.* Smyth 644
Battley *v.* Lewis . 30, 386, 831
Batty *v.* M'Cundie . 199, 377, 590
Bawden *v.* Howell 476
Baxter *v.* Brown 672
v. Hozier 1022
v. The Earl of Portsmouth 83, 406
v. West, . . 88, 92, 97, 228
Bayley, *ex parte* (9 B. & C.) . . 73
v. Manchester and Sheffield Railway Co 300
v. Wilkins 732*
Bayliffe *v.* Butterworth . . 732*
Bayly *v.* Schofield 843
Baynard *v.* Woolley . . 771, 772
Beak *v.* Beak 974, 975
v. Caddick 277, 393, 422, 426*, 430
v. Mouls . . 390*, 391
Beamish *v.* Beamish 852
Bear *v.* Bromley 56, 168
Beard *v.* Webb 84
Beattie *v.* Lord Ebury . . 275, 367
Beaumont *v.* Boultbee . 968, 969
v. Greathead 417
v. Grover 945
v. Meredith . . 457, 896
Beavan *v.* M'Donnell 83
Beck's case . . . 105, 112, 113
Beck *v.* Dean 875
v. Kantorowicz 580, 581*, 883, 923, 949
Beckford *v.* Wade 455
Beckham *v.* Drake 290, 296, 338*, 361, 366, 477, 483
v. Knight . . 338, 483
Beckitt *v.* Bilbrough . 707, 720
Bedford *v.* Bagshaw 324, 717, 926
v. Brutton 874, 1026, 1028, 1030
v. Deakin 440*, 443, 449, 450
Bedford Railway Co. *v.* Stanley 400
Beech *v.* Eyre 391, 496
Beecham *v.* Smith . 212, 1028, 1030
Beecher *v.* Guilburn . . . 788
Beeching *v.* Lloyd 889
Beer *v.* Beer 1022
v. Sykes . . 657, 865, 867

PAGE
Beldon *v.* Campbell . . 273
Belfast, &c., Railway Co. *v.* Strange 639
Bell, *ex parte* (1 M. & S.) . 188, 472
v. Banks 452
v. Francis 242
v. London and North-Western Railway Co. 265
v. Mexborough . . . 921*
v. Morrison . . . 458
v. Nevin 231
v. Phyn 668*, 670
v. Reid 79
Bellairs *v.* Ebsworth 213
Belshaw *v.* Bush 419
Belton *v.* Hodges 81
Beman *v.* Rufford 606, 608, 819, 885, 901*, 1002
Bendy *v.* Harding 521
Benham *v.* Gray . . 648, 1024
Benjamin *v.* Porteus . . . 37*
Bennett's case 739
Bennett *v.* Blain . . . 672, 673
v. Lytton 1048
v. Hadfield 486
v. Heathorn 576
v. Paull . . . 519, 1036
Bentley *v.* Bates 62, 653, 700, 946, 951
v. Craven . . 572*, 774
Beresford's case 746
Beresford *v.* Browning . 370*, 1051
Bermingham *v.* Sheridan 702, 712, 714, 720, 725, 730
v. Alderman . . . 327
Besch *v.* Frolich 226
Besley's case, or Besley, *ex parte* 32
Best's case 102, 104
Betts *v.* De Vitre . 300, 324, 495
v. Gibbons . . . 755, 771
Bevan *v.* Attorney-General . 1075
v. Lewis 361*, 691, 880, 997
v. Waterhouse . . 1078
Beveridge *v.* Beveridge . . 599
Beverley *v.* Lincoln Gas Co. . 354
Biddlecombe *v.* Bond . . 843
Biddulph, *ex parte* . . . 304
Biederman *v.* Stone 714, 721, 733
Bigg's case, or *ex parte* (1 Eq.) 750
Bigge's case (5 Jur. N. S.) 322
Biggs *v.* Lawrence . 182, 199, 470
Bignold, *ex parte* (22 Beav.) 761*, 778, 787, 829, 968
v. Waterhouse 287, 288*, 330*
Bilborough *v.* Holmes . 446, 448
Bill *v.* Darenth, &c., Railway Co. 557
v. Richards . . 377, 530*
v. Sierra Nevada Mining Co. 607, 1004
Billiter *v.* Young . 658, 736, 931
Binford *v.* Dommett . . . 676
Bingham, *ex parte* . . . 392
PAGE
Birch, *ex parte* 736
Birch's case 141, 142, 147, 461, 736, 738
Bird's case (1 Sim. N. S.) . 163, 178
case (4 D. G. J. & S.) . 104
Birkenhead, Lancashire, &c., Railway Co. *v.* Brownrigg 140, 157, 158, 639
v. Cotesworth . 640, 1033
v. Pilcher . . . 82, 636
v. Webster 631
v. Kennedy 960
Birmingham Bank, *ex parte* (3 Ch.) 245, 829
Birmingham, Bristol, &c., Railway Co. *v.* Locke, 131, 132 140, 158, 636, 750
v. White 810
Bishop *v.* Church . 370*, 452, 1052
v. The Countess of Jersey 305, 309*
Blackburn's case . . 107, 112
Blackett *v.* Weir 93
Blackley *v.* Rymer 962
Blades *v.* Free 404
Blain *v.* Agar . . 879, 945, 954
Blair *v.* Bromley 294 305*, 313, 315*, 374, 375, 455, 1052
Blake *v.* Mowatt 942
Blakeley's case . . 1049, 1066
(executor's case . 405, 1049
Blakeney *v.* Dufaur . . . 1013
Blann *v.* Bell 1077
Bleadon *v.* Hancock 481
Bleckley, *re.* 759
Blew *v.* Wyatt . . . 442*, 449
Blewitt *v.* Gordon 496
Bligh *v.* Brent 673, 674
Blisset *v.* Daniel 221, 569, 570, 600, 745, 806, 818, 820, 839, 844*, 848, 932, 951, 972, 995
Bloomer *v.* Union Coal Co. . 271
Blount *v.* Hipkins . . 640, 1079
Bloxam's case (33 Beav. and 4 D. G. J. & S.) . . 103
v. Metropolitan Cab Co. 635, 717, 943, 1000
Bloxam *v.* Metropolitan Railway Co. 791, 793, 811, 885, 889, 901, 1001
v. Pell . 22, 35*, 36, 37, 38
Bluck *v.* Mallalue 553, 780, 885, 919, 1001, 1003
Blundell *v.* Winsor . 6, 193, 194, 436
Blyth *v.* Lafone 868
Boast *v.* Firth 837
Boddam *v.* Ryley . . 789, 809
Boddington *v.* Castelli . . . 491
Bodenham *v.* Purchas . . 425
Bodmin United Mines, *re* 147, 148, 738
Bog Lead Mining Co. *v.* Montague 126, 170, 179

PAGE
Bolingbroke *v.* Local Board of Swindon 300
Bolitho, *ex parte* 346
Bolland, *ex parte* (Mont. and McAr.) 306, 307
Bolton *v.* Madden 548
Bonar *v.* Mitchell 161
Bonbonus, *ex parte* 269, 285, 329, 361
Bond *v.* Gibson 327*
v. Pittard 22
Bone *v.* Pollard . . . 58, 643
Bonfield *v.* Smith 366, 482, 483, 509
Bonnardet *v.* Taylor 959
Bonser *v.* Cox 1058
Bonville *v.* Bonville 918
Booth *v.* Bank of England . 185
v. Booth 1073
v. Fielding 730
v. Hodgson . . 188, 201
v. Leycester 786
v. Parkes 219, 823, 976, 977, 982, 983, 1072
Borough of Hackney Newspaper Co. 286
Borries *v.* Imperial Ottoman Bank 508
Bosanquet *v.* Graham . 524, 527
v. Ransford 532
v. Shortridge 137*, 141, 162, 246, 534, 535*, 637
v. Woodford . . 162, 469
v. Wray 212, 469, 1030, 1031
Boson *v.* Sandford 374
Boston, Newark, and Sheffield Co. See Williams, *ex parte*
Boswell *v.* Smith 506
Bottomley *v.* Fisher 349*
v. Nuttall 338, 340, 450, 453
Boulter *v.* Peplow . 1022, 1029
Boulton, *ex parte* . . . 289
v. Jones . . 346, 488
Bourdillon *v.* Roche . . . 303
Bourdin *v.* Greenwood . . 456
Bourne *v.* Freeth 53, 97, 98, 108, 241, 612
Bousfield *v.* Wilson 198, 203, 710, 735
Boussmaker, *ex parte* . . 78
Bovill *v.* Cowan 958
v. Hammond 1028, 1029, 1030
Bower *v.* Marris 421
v. Swadlin 433
Bowes *v.* Lucas 422
v. City of Toronto . . 979
Bowker *v.* Burdekin . . . 279
Bowlby *v.* Bell . 675, 718, 732
Bowring *v.* Shepherd 714, 721, 722, 727, 729
Bowron, Baily & Co. See Baily's case
Bowsher *v.* Watkins . 932, 1068
Box, *re* 1078, 1079
Boyce *v.* Douglas 451
v. Green 674

PAGE
Boyd *v.* Emerson 265
Boydell *v.* Drummond . . . 415
Boyes *v.* Bluck 434
Boys, *re* 431
Brackenbury *v.* Brackenbury . 198
v. Dickens . 855, 860, 996
Bradford Tramways Co. . . 155
Bradley *v.* Eyre 524, 526*, 527, 532
v. Holdsworth 674
v. Millar, ... 1058
v. Urquhart 526
v. Warburg 524
Braithwaite *v.* Britain 446, 449, 455, 457, 1052, 1069
v. Skafield 54
Bramah *v.* Roberts . 243, 246, 267
Brampton *v.* Beddoes . . 857
Brand *v.* Boulcott . . . 479
Brander *v.* Brander . . ; 1080
Brandon *v.* Hubbard . . 479
v. Scott . . . 470, 471
Brandram *v.* Wharton . . 457
Brasier *v.* Hudson . 275, 486, 665
Bray *v.* Fromont 54, 698, 879, 946
Breckenridge's case . . 173, 175
Bree *v.* Holbech 455
Brenmer *v.* Chamberlayne 242, 390
Bretherton *v.* Wood . . . 374
Brett *v.* Beckwith 18*, 180, 188, 199, 338, 366, 1052, 1055*
v. Marsh 421
Brettel *v.* Williams . . 238, 281*
Brewer *v.* Pocock . . . 1048
Brice's case . . . 404, 1060
Bridges *v.* Mitchell . . . 963*
Bridport Old Brewery Co. 546, 547
Brierley *v.* Cripps . . . 1027
Brigg's case (1 Eq.) . 113, 115, 925
Briggs, *ex parte* (3 D. & Ch.) . 23
Bright *v.* Hutton 32
Brighton Arcade Co. *v.* Dowling 1034
Brinsmead *v.* Harrison . . 451
Bristed *v.* Wilkins . 694, 695, 798
Bristol and Taunton, &c., Co. *v.* Amos 139
Bristow *v.* Maxwell . . . 456
v. Taylor 275
v. Whitmore 684
Bristowe *v.* James 482
British and American Telegraph Co. *v.* Colson 102
v. Albion Bank 282, 290, 298
British Empire Co. *v.* Browne 357
British Farmers, &c., Co. . 614
British and Foreign Cork Co. See Leifchild's case
British Linen Co. *v.* Drummond . 455
Poultry Co. See Nichol's case
Provident Assurance Society *v.* Norton . 552, 552, 762

PAGE
British Sugar Refining Co. 143, 172, 546, 629
Brockbank *v.* Anderson . . 96*
Brodie *v.* Howard 297
Bromley *v.* Williams 57, 188, 883, 948
Brooke *v.* Enderby . . . 428
v. Garrod . . . 843, 851
Brooks *v.* Sutton 971
Broom *v.* Broom 669
v. Hall 755
Broome, *ex parte* 49, 72, 925, 927, 1011
Brophy *v.* Holmes 71
Brotherhood's case 260, 739*, 740*, 743, 905
Broughton *v.* Broughton . 470, 473
v. Manchester and Salford Water-works Co. 185, 267, 268, 352
Brown's case (19 Beav.) . . 598
claim (9 W. R.) 262, 364*, 614
Brown *v.* Adams 314, 422
v. Andrews 244
v. Black . . . 728*, 730
v. Boorman 374
v. Brown 96
v. Byers . . 246, 267, 273
v. De Tastet 699, 775, 879, 946, 974, 979, 982*, 983, 1072
v. Douglas . . . 1059*
v. Duncan . . 184*, 189
v. Gellatly . . . 1046
v. Gordon 404, 446, 447, 448*, 449, 455, 457, 1052, 1053
v. Hall 732
v. Holt 193
v. Jodrell 83
v. Kidger . . 267, 269, 282
v. Leonard 48, 333*, 407, 410*
v. Litton 981
v. London and North Western Railway Co. . . 79
v. Oakshot 652*
v. Perkins . . 971*, 993
v. Tapscott . 22, 1026, 1028
v. Vidler 981
v. Weatherby . . . 1059
v. Wootton 451
Browne *v.* Collins . 792, 1079, 1081
v. Gibbins 782
v. Monmouthshire Railway and Canal Co. 790, 792, 886, 1003
v. Savage 289
Brownell *v.* Brownell . . . 969
Browning *v.* Browning . 817, 848
v. Great Central Mining Co. 248, 397*
Brownrigg *v.* Rae . . 285, 470
Brumfitt *v.* Bremner . . . 825
Brunswick *v.* Sloman . . . 299
Brutton *v.* Burton . 208, 278, 474
Brydges *v.* Branfill . 303*, 313, 375
Bryon *v.* The Metropolitan Saloon Omnibus Co. 270, 274*, 599, 614, 622, 1003
Bryson *v.* Warwick, &c., Canal Co. 593, 884
Buck *v.* Buck . . 192, 198, 735
Buckland *v.* Johnson . . . 451
Buckley, *ex parte* . . 350*, 366
v. Barber 295, 490, 666, 1031, 1092
Buckwell *v.* Child . . . 1076
Buddle *v.* Willson 482
Bugg's case . . . 127, 231
Bull *v.* O'Sullivan 275
Bullen *v.* Sharp . . 40*, 42, 329
Bullock *v.* Caird 468
v. Chapman 142, 863, 999, 1000
v. Crockett . . . 74, 75
v. Dodds 80
Bulmer *v.* Norris 673
Bult *v.* Morell . . 268, 346, 347
Bunn *v.* Guy 182
Bunn's case . . 106, 282, 614
Burbidge *v.* Robinson . . . 958
Burden *v.* Burden . . 775, 777, 983
Burdon *v.* Barkus 73, 88, 218, 646, 648, 780*, 781, 1015, 1017
Burfield *v.* Rouch . . . 864
Burge's and Stock's case 260, 262, 280 363
Burgess *v.* Burgess . . . 210
v. Merrill . . . 81, 483
Burgue *v.* De Tastet 98
Burke *v.* Dublin Trunk Railway Co. . . 525, 537, 538
v. Lechmere . . 100, 159
Burland *v.* Nash . . 421, 429*
Burleigh *v.* Stott 457
Burlinson's case 84
Burls *v.* Smith 57
Burmester *v.* Crofton . . . 524
v. Norris . 269, 272, 273, 362
v. Von Stentz . . . 498
Burn *v.* Burn 278, 870, 871*, 1052, 1054
Burnell *v.* Hunt . 30*, 86, 648, 690
Burnes *v.* Pennell 117, 130*, 132, 243*, 248, 294, 324, 541, 636, 794, 816
Burns *v.* Poulsom 297
Burnside *v.* Dayrell . 93, 123, 242
Burroughs *v.* Elton . . . 1069
Burt *v.* British Nation Co. 741, 889, 890, 905
Burton (3 M. D. & D.) . 312, 313
v. Green 688
v. Issitt 409*
v. Tannahill . . 497, 495
v. Wigley 870
v. Wookey 576*
Bury *v.* Allen 72, 75, 783, 945, 974

PAGE

Bury *v.* Bedford 863
Bush's case (L. R., 6 H. L. & 6 Ch.) . . . 133, 703
v. Martin 456
Bushell, *ex parte* 327, 330
Busk's case 739
Butchart *v.* Dresser 285, 411, 412*, 598
Butler *v.* Withers 663
Butt *v.* Monteaux 196, 198, 203, 883, 954
Buxton *v.* Lister 915
Bwlchy Plwm Lead Mining Co. *v.* Baynes 636
Byers *v.* Dobey 482

CABELL *v.* Vaughan . 475, 482, 484
Cachar Co.
See Lawrence's case
Caddick *v.* Skidmore 89*
Cadman *v.* Cadman 675
Caerphilly Colliery Co.
See Parson's case
Caillaud's, &c., Co. *v.* Caillaud . 493
Calcutta Jute Mills *v.* Nicholson 79
Caldecott, *ex parte* 686
Calder, &c., Nav. Co. *v.* Pilling 548, 605
Calder *v.* Dobell 337
v. Rutherford 490
Caldicott *v.* Griffiths . . 1021, 1030
Caldow *v.* Pixell 825
Caledonian and Dumbartonshire Railway Co. *v.* Helensburgh . . 400, 401
Lodge of Freemasons . 57
Calton *v.* Bragg 786
Camden *v.* Anderson 644
Cameron Coalbrook Steam Coal, Swansea and Loughor Railway Co.
See Bennett's case
Hunt's case (32 Beav.)
Campanari *v.* Woodburn . . 404
Campbell's case (9 Ch.) . 134, 619
(4 Ch. D.) 271, 591, 619
Campbell *v.* Campbell . 771*, 784
v. Flemings 924
v. Maund 549
v. Mullett . . 61, 645, 655
Canadian Native Oil Co.
See Fox's case
Canadian Oil Works Corporation
See Hay's case
Candler *v.* Candler . . 190, 1009
Cane *v.* Chapman 519
Cape's Executor's case 394
Capper's case (1 Sim. N. S.) . . 32
(3 Ch.) 173
Card *v.* Carr 244
v. Hope 548

PAGE

Carden *v.* General Cemetery Co. 395, 776
Cardiff and Carphilly Iron Co.
See Gledhill's case
Coal and Coke Co. (11 W. R.) 629
Cardiff Coal Co. *v.* Norton 629, 659
Carew's case 754, 781
re 290
Carlen *v.* Drury . 376, 896*, 1003
Carling's case 590
Carlisle Canal Co. *v.* South East Railway Co. 885, 888, 901, 1001
Carmarthen Railway Co *v.* Wright 126, 127, 132, 141, 160, 635
Carmichael's case 103
v. Carmichael 967
Carne *v.* Legh 484
Carpenter, *ex parte* 736
Carr *v.* Smith 1027
Carrington *v.* Cantillon . . 474
Carron Co. *v.* Maclaren . . . 79
Carruthers *v.* Sheddon 208
Carter *v.* Dean of Ely . . 353, 357
v. Horne 66, 573*
Southall 474
v. Whalley . . 405*, 408
Cartmell's case . 245, 248, 259, 704 738, 739, 742
Carver *v.* Pinto Leite . . . 962
Castellan *v.* Hobson . . 728, 730
Castelli *v.* Boddington . . . 503
Catchpole *v.* Ambergate, &c. Railway Co. 145, 751
Catholic Publishing &c., Co. . 766
Catling *v.* Skoulding 966
Catt *v.* Howard 264
Cavander *v.* Bulteel . 681, 698, 699
Cavendish *v.* Geaves . . 507, 510*
Cawthorne *v.* Chalie . . 878, 1045
Cawthorn *v.* Trickett . . . 479
Cefn Cilcen Mining Co. . . 273
Central Railway of Venezuela *v.* Kisch 924, 935
Cesena Sulphur Co. *v.* Nicholson 79
Challis's case 134
Chambers *v.* Howell . . . 933
v. Manchester, &c., Railway Co. 271, 363
Chancey *v.* May 883
Chandler *v.* Danks 483
v. Dorsett . . . 570, 931*
v. Howell 673
v. Parkes 81
Channell *v.* Ditchburn . . . 457
(2 Eq. 567) . . 102, 104
Chapman *v.* Beach . . 1012
v. Beckington . . 213
v. Koops 689
v. Milvain . . 497, 892
v. Shepherd . . 714, 733
Chappell's case (6 Ch.) . . 702

PAGE
Chapple *v.* Cadell 295, 296, 818*, 900, 949
Charitable Corporation *v.* Sutton 593
Charles *v.* Branker . . . 98
Charlton and Newcastle and Carlisle Railway Co. . 606, 885, 1001
v. Poulter . . 227, 808, 997
Chase *v.* Cox 421
Chavany *v.* Van Sommer . . 221
Chavasse, *ex parte* 181
Cheale *v.* Kenward . . 707, 713
Cheap *v.* Cramond 361
Cheesman *v.* Price . . . 228
Cheetham *v.* Crook . 505, 507, 1052
v. Ward . . . 418, 433
Cheltenham, &c., Railway Co. *v.* Daniel 131*, 132, 636
v. Price . . 140, 141, 158
Cherry *v.* Colonial Bank of Australia 368
Child *v.* Morley . . 732, 756, 758
China Steamship and Labuan Coal Co.
See Capper's case
Drummond's case
Chippendale, *ex parte* 228, 362, 759, 760, 777, 785, 786, 787
Chippindale *v.* Thurston . . 456
Cholmondeley *v.* Clinton . . 858
Chorley, *ex parte* . . 474, 527
Christian *v.* Taylor 955*
Christie, *ex parte* (M. & Bl.) . 451
(3 M. D. & D.) . . 350
v. Commissioners of Inland Revenue 866
v. Peart 499
Christophers *v.* White . . . 470
Chuck, *ex parte* . . 20, 648
v. Freen 215
Church and Empire Fire Insurance Co.
See Pagin and Gill's case
Church *v.* Imperial Gas Co. . 354
Churchill *v.* Bank of England 798
Churton *v.* Douglas 855*, 862, 998
City Bank, *ex parte* . . . 360
City Discount Co. *v.* Maclean 425, 430
City of London Gas Co. *v.* Nicholls 291, 338
City of London *v.* Richmond . 502
City of Moscow *v.* International Financial Society . . . 493
Clancarty *v.* Latouch . . . 968
Clark, *re* 191
v. Alexander . . . 966
v. Cort 504
v. Leach . . . 823, 846
v. Newsam 123
v. Watkins 857
re (De Gex) . . 350, 366
Clarke *v.* Bickers . . 372*, 1051
Clarke *v.* Blackstock . . . 348
v. Chaplin 118
v. Clement 515
v. Cuckfield Union . 353
v. Dickson 324, 717, 924, 925, 926
v. Hart . . 744, 846, 911
v. Imperial Gas Light and Coke Company . . 254*
v. Lord Abingdon . . 871
v. Tipping . . . 963
Clarkes, *re* 452
Clarkson, *ex parte* . 654, 655, 656
v. Edge . . . 858, 871
Clavering *v.* Westly . . 1051
Clay *v.* Langslow . . . 95, 97
v. Rufford 501, 606, 819, 888
v. Southern . . . 501
Clayton's case 304, 374, 421, 422*, 432, 446, 448, 449, 973, 1052, 1053
Claxton *v.* Kinaston . . 433
Clegg *v.* Clegg . 63, 66, 577, 643
v. Edmonson 221, 574*, 907,* 912 914, 962
v. Fishwick 569, 574, 1012, 1066
Clements *v.* Bowes 235, 883, 891, 944, 952, 953, 954, 968
v. Hall 569, 574, 910, 912*, 913, 982, 983
v. Todd . . . 121*
Clemonston *v.* Blessig . . 78
Cleve *v.* Financial Corporation 546
Cleveland Iron Co. *v.* Stephenson 324
Clifford *v.* Brooke . 877. 927, 945
Clinan *v.* Cooke 359
Clinch *v.* Financial Corporation (2 Eq.) 958
v. Financial Corporation (5 Eq. & 4 Ch.) 295, 885, 901, 902
Clive *v.* Clive . 1079, 1080, 1081
Clough *v.* London and North Western Railway Co. . . . 924
Clowes, *ex parte* . . . 311, 392
v. Brettell 140, 395, 520, 534, 539
Coates *v.* Coates 917
v. Nottingham Waterworks Co. . . . 618
Cobre Copper Mine Co.
See Kelk's case
Pahlen's case
Weston's case
Cobham *v.* Holcombe . . . 496
Cockburn's case (4 DeG. & S.) . 739
v. Thompson . . 881, 882
Cocker's case . . . 381, 463
Cockerell *v.* Aucomte . . . 57
v. Van Dieman's Land Co. 720
v. Barber 775
Cockle *v.* Whiting . . . 661, 930
Cockrill *v.* Sparkes . . . 459
Cocks *v.* Nash . . . 418, 433
Coe *v.* Wise 300

PAGE

Coffee *v.* Brian . . 1028, 1028
Cofton *v.* Horner . . 895, 998
Cohen *v.* Wilkinson . 885, 1001
Colbeck, *re* 37
Colborne and Strawbridge . . 360
Colburn *v.* Patmore . . . 770
Colchester *v.* Lowten . . . 356
Colegrave *v.* Manley . . . 859
Coleman's case (1 DeG. J. & S.) 135
v. Riches 298
v. Mellersh 968
Coles *v.* Bristowe 716, 721, 722, 724, 729
Coles *v.* Gurney 474
v. Sims 871
v. Trecothick 359
Collen *v.* Wright . . . 326, 367
Collett *v.* Foster 298
Colley *v.* Smith 1030
Collie's claim 246
Collingwood *v.* Berkeley . 49, 53, 242
Collins *v.* Blantern . . 202, 755
v. Carey 470
v. Collins (26 Beav.) . . 850
v. Collins (12 Eq.) . 662, 1076
v. Evans 755
v. Jackson . . 651*, 833
v. Prosser 434
v. South Staffordshire Railway Co. 359
v. Young 1009
Collinson *v.* Lister . . 287, 288*
Collum's case 123
Colman *v.* Eastern Counties Railway Co. 280, 282, 884, 1001
Colonial Life Assurance Co. *v.* Home and Colonial Assurance Company 210
Colson *v.* Selby 483
Colt *v.* Nettervill 675
v. Wolaston . . 879, 954
Columbian Government *v.* Rothschild 954
Columbine *v.* Chichester 720, 919, 920
Colyear *v.* Countess of Mulgrave 851
Combe's case 337
Commercial Bank Corp. of India and the East 444, 465
Commercial and General Life, &c., Association
See Johnson, *ex parte* (27 L. J. Ch.,
Compagnie Générale de Bellegarde
See Campbell's case (4 Ch. D.)
Connell, *ex parte* (3 Dea.) . . 644
Connop *v.* Levy . . . 377, 530
Conquest's case 464
Consols Insurance Association *v.* Newall 706
Const *v.* Harris 570, 598, 600, 604*, 820, 821, 822, 999, 1005
Consterdine *v.* Consterdine . . 663

PAGE

Contract Corporation, *ex parte* (3 Ch.) 86, 245, 356, 707
Conver's case 377
Conway's case 103
Conybeare *v.* New Brunswick, &c., Co. 940*
Cooch *v.* Goodman . . . 192, 211
Cook *v.* Catchpole 870
v. Collingridge 735, 847. 933, 934, 972, 974, 983*, 1015*, 1017, 1073
v. Gregson 675
v. Jones 526
v. Rhodes 856
v. Ward 245
Cooke *v.* Batchelor 480
v. Benbow . 786, 788, 836*
v. Cooke 868
v. Seeley 478*
v. Tomkin 242
v. Wilson 339
Cookson *v.* Cookson . 668, 670, 823
Coomer *v.* Bromley . 305, 308, 310*
Coope *v.* Eyre . . . 22*, 24, 60*
Cooper, *ex parte* (1 M. D. & D.) 654, 657
v. Hood 918
v. Powis 887
v. Shropshire Un. Railway and Can. Co. . . 627, 1003
v. Wandsworth Board of Works 845
v. Watlington 857
v. Watson 857
v. Webb . . 883, 952, 954
Cope's case 378, 379
Cope *v.* Rowlands 187
v. The Thames Haven 353, 356
Copeland, *ex parte* (2 Mon & Ayr) 285
v. North Eastern Railway Co. . . 144, 161, 705
Copland *v.* Toulmin 422, 425, 430, 676, 677
Coppard *v.* Allen 486
Copper Miners' Co. *v.* Fox 280, 352, 355, 356
Corbridge, *ex parte* 45
Corcoran *v.* Witt 869
Corder, *v.* Universal Gas Light Co. 525
Cork and Bandon Railway Co *v.* Cazenove . . 82, 83, 636
v. Goode . 640, 1033, 1049
Cork and Youghal Railway Co. (4 Ch.) . . 271, 363, 766
v. Paterson 110, 111, 159, 625, 635
Cornelius *v.* Harrison . . . 52
Cornell *v.* Hay 116
Corner *v.* Maxwell-Irwin . 500, 875
Cornill *v.* Hudson 454
Cornwall Gt. Consolidated Mining Co. 551, 632
v. Bennett 175

PAGE
Corpe *v.* Glyn . 518, 519, 520, 1037
v. Overton . . . 82
Corry *v.* Londonderry and Enniskillen Railway Co. 618, 790, 792
Cosio *v.* De Bernales . . . 84
Costeker *v.* Horrox 960
Cothay *v.* Fennell . . . 478, 479
Cottam *v.* Eastern Counties Railway Co. . . . 301, 793
v. Partridge . . 454, 966
Cotterell's case 544
County Life Assurance Co. 244, 246, 253
County Marine Insurance Co. See Rance's case
County Palatine & Discount Co. See Teasdale's case
Coupland *v.* Challis 119
Court Grange Silver Lead Mine See Sedgwick, *ex parte*
Courtenay *v.* Wagstaff . . 27
Cousins *v.* Smith 200
Coventry *v.* Barclay 820, 839, 847, 848 850
Cowell *v.* Edwards 769
v. Sikes . . 1054, 1055
v. Watts 89, 906*
Cowie *v.* Sterling 340
Cowslad *v.* Cely 485
Cox's case (4 DeG. J. & S.) . 127
Cox *v.* Dolman 471
v. Hickman . . 34, 38*, 238
v. Hubbard 478
v. Midland Counties Railway Co. 248
v. Stephens . . . 486, 878
Cragg *v.* Ford . . . 783*, 784*
v. Taylor 694
v. Taylor (No. 2) . . 694
Cragoe *v.* Jones 435
Craig *v.* Phillips 116
Cramer *v.* Bird 883
Crampton *v.* Varna Railway Co. 353, 355
Crawford *v.* Hamilton 230, 232, 697, 1044
Crawford *v.* North Eastern Rail. Co. 618
v. Stirling 281
Crawley's Case . . . 103
Crawshay *v.* Collins 411, 643, 661, 744, 775, 806, 823, 972, 974, 975, 980, 981*, 1015, 1041, 1046
v. Maule 61, 62, 63, 219, 221, 230, 232, 411, 651, 698, 701, 1015, 1016, 1018, 1041
Credit Foncier and Mobilier, of England, *ex parte* (7 Ch.) 244, 290
Credit Foncier of England (11 Eq.) 620
Crellin *v.* Brook . 237, 501
v. Calvert . . . 501
Cresswell *v.* Hedges . . . 65
Creuze *v.* Hunter 786
v. DeMauley . . 879 954
Croft *v.* Allison 298
PAGE
Croft *v.* Pike . 661, 682, 1054
Cromford, &c., Railway Co. *v.* Lacey . . 111, 131, 133*, 636
Crook *v.* Seaford . . . 355
Cropper's case, or Cropper, *ex parte* 765
Cropper *v.* Knapman . . 1069
Crosbie *v.* Guion . . . 232
Croskey *v.* Bank of Wales 623, 880, 889
Cross *v.* Cheshire . . . 1027
v. Law . . . 532, 533
v. Williams . . . 57
Crosse *v.* Smith . . . 418
Crossfield *v.* Such . . . 58
Crowe *v.* Crissford . . 1077
Crowley's claim 733
Croxton's case (5 De G. & S.) 778, 782
Cruikshank *v.* McVicar 770, 923, 945, 974*
Cruse *v.* Paine . 725, 729, 769
Cruttwell *v.* Lye 855
Cubitt *v.* Porter 1025
Cullen *v.* Duke of Queensborough 379, 502
v. O'Meara . . . 397
v. Thompson . 324, 926
Cumberledge *v.* Lawson . 279
Cuming *v.* Boswell . . . 1080
Cumming *v.* Prescott . . 544, 664
Cummins *v.* Cummins . . 436
Curling *v.* Flight . 145, 149, 713
Currie's case . . 544, 614
Curteis *v.* Anchor Insurance Co. 357, 553
Curtis' case 82
Curtis *v.* Barclay . . 755, 757
v. Perry . . . 644
Custance *v.* Bradshaw . . 672
Cutbill *v.* Kingdom . . 547
Cutbush *v.* Cutbush . 1063
v. Sanger . . . 843
Cutts *v.* Riddell . . . 876

Da Costa *v.* Russia Co. . . 1036
Dails *v.* Lloyd 735
v. Hamilton 70, 88*, 89, 90, 264, 570, 916*
Dalton *v.* Midland Railway Co. . 798, 1035
Daly *v.* Thompson . . 143, 145
Daniel *v.* Cross . 443, 446, 1052
Daniell *v.* Roy. Brit. Bank 140, 179, 528, 925
Daniell's case, or Daniell, *ex parte* (22 Beav.) . . . 739
v. Girdler . . . 214
Darby *v.* Boucher 273
v. Darby . . 661, 670*
D'Arcy *v.* Tamar, &c., Railway Co. 246, 356, 555, 829
Darlington Banking Co. See Riches, *ex parte*

PAGE
Darwent *v.* Walton . 370, 485, 1051
David *v.* Ellice . 438*, 439, 449
Davidson, *ex parte* (1M. D. & D. E. G.) 686
Davidson's case (4 K. & J.) . 604
Davidson *v.* Bower . . . 499
v. Cooper . . 498, 499
v. Napier . . . 859, 997
v. Robertson . . 266, 344
v. Tulloch 324, 717, 926, 1051
v. Davies . 932*, 947, 1069
Davies *v.* Edwards . . 457
v. Hawkins . . 601, 604
v. Hodgson . 854, 855, 860, 861
Davis's case (12 Eq.) . 270, 766
Davis *v.* Amer . 865, 917, 997, 1010*
v. Bank of England . 301
ex parte (4 De G. J. & S.) 27, 28*
v. Fisk . . 881, 891
v. Haycock . . 726, 729
v. Jones 831
v. Johnston . . 67, 908
Davys *v.* Douglas . . 191
v. Dawson . . . 969
v. Fitzgerald . . 868
v. Morrison . . . 242
v. Wrench . . . 379
Day *v.* Day . . 1078, 1079
Dean *v.* Allen 1048
v. Bennett 547
v. Mellard . . . 492
v. Newhall . . 418, 433
Deare *v.* Soutten . . . 273
De Begnis *v.* Armistead . 191, 201*
De Berenger *v.* Hamel . . 228
De Berkom *v.* Smith . . 47, 56, 96
Deeks *v.* Stanhope . 878, 881, 952
Deffell *v.* White 286
Defries *v.* Creed . . . 1014
De Gendre *v.* Kent . . . 1080
De la Rosa *v.* Prieto . . 189
De la Rue *v.* Dickinson . . 962
Delauney *v.* Strickland . . 57
Delhasse, *ex parte* . . 22, 45
Deloraine *v.* Browne . . 914
De Mautort *v.* Saunders 366, 485, 508
De Mazar *v.* Pybus . . . 210
Dent's case 170
Dent *v.* Turpin 68
Denton *v.* Great Northern Railway Co. . . . 324, 926
v. East Anglican Railway Co. 354
v. Macneil . . 924, 940
v. Peters . . . 1028
v. Rodie . . 269, 787
Denys *v.* Schuckburgh . . 62
De Pass, *ex parte*, or De Pass' case 701, 705
Deposit and General Life Assurance Co. *v.* Ayscough . . 636
De Ribyre *v.* Barclay . 269, 305*, 315

PAGE
Derbyshire, &c., Railway Co. . 538
Dering *v.* Winchelsea . 754, 769
Derry *v.* Mazarine . . . 84
v. Bordenave . 410, 996
v. Bordieu . . . 1011
v. Carroll . . . 291
v. Shaw . 207, 211, 1030, 1031
Deux *v.* Jefferies . . . 293
Devaynes *v.* Noble 972, 1051, 1052, 1056
Devaynes *v.* Noble,
Baring's case 313, 315, 370, 375, 1052
Brice's case . 404, 1060
Clayton's case 304, 374, 421, 422*, 432, 446, 448, 449, 1052, 1053
Houlton's case 52, 404, 1060
Johnes' case . . 404, 1060
Palmer's case . 446, 459, 1052
Sleech's case 313, 375, 446, 449, 1052, 1053, 1058
Ward's case . . 1052
Devereux *v.* Kilkenny Railway Co. 521, 538
Dewdney, *ex parte* . . . 457
Dickenson *v.* Lockyer . . . 436
Dickinson *v.* Valpy 27, 49, 237, 239, 241, 266, 267, 387
v. Neath and Brecon Railway Co. 522
v. Reuter's Telegraph . . 367
Digby, *ex parte* 36
Diggle *v.* Higgs 197
v. London and Blackwell Railway Co. . 353, 356, 358
Dimes *v.* Scott 1078
Dimsdale *v.* Robertson . . . 868
Dinham *v.* Bradford . 787, 850
Direct Birmingham, Oxford, Reading, and Brighton Rail. Co.
See Amsinck's case
Onion's case
Spottiswoode's case
West End and Croydon Rail Co.
See Lloyd *ex parte*
Dixon's case, or Dixon *v.* Evans (5 Ch. &. L. R. 5 H. L.) . . 741
Dixon *v.* Clark 420
v. Cooper 37
v. Hammond . . 490, 665
v. Holden 999
v. Wilkinson . . . 303
v. Wrench 694
Dobbin *v.* Forster 488
Dobell *v.* Stevens 926
Dobinson *v.* Hawks . . . 86
Docker *v.* Somes . 978, 985, 990, 1071, 1072
Dockway *v.* Dickenson . . . 481
Doddington *v.* Hallet . 67, 661, 680

PAGE
Dodds *v.* Hills . . . 664, 718
Dodgson, *ex parte* (Mon. & McAr.) 54, 1028
v. Bell . . 85, 162, 535
v. Scott . 525, 527, 532, 534
Doe *v.* Baker 482
v. Bluck 648, 1024
v. Bold 352
v. Horn 1025
v. Hulme 283
v. Knebell 395
v. Miles 222, 648
v. Prosser 65
v. Roe 475
v. Summersett 283
v. Tanniere 352
Dolman *v.* Orchard . 407, 408, 410
Domville *v.* Solly 960
Donaldson *v.* Gillot . . 664, 718
v. Williams 296
v. Williamson 598
Doe *v.* Chippenden 483
Doran *v.* Simpson 1069
Dore *v.* Wilkinson 295
Dossett *v.* Harding . . 140, 179, 521
Douglas *v.* Horsfall 501
v. Patrick 278
Dover, Hastings, and Brighton Junction Railway Co. Carew's case
v. Opey 200
Downam *v.* Matthews 507
Downs *v.* Collins 735, 8 1, 914, 918, 1015
v. Ship . . 107, 112, 173
Dowse's case . 381, 463, 465
Doyle *v.* Muntz 888
Drake *v.* Mitchell 452
v. Symes 956
Draper *v.* Manchester and Sheffield Railway Co. 959
Dresser *v.* Norwood 287
Drew *v.* Drew 961
Driver *v.* Burton 476
Droitwich Patent Salt Co. *v.* Curzon 619
Drouet *v.* Taylor . . 93, 123, 242
Drummond's case 278
Drury *v.* Drury 65
Dry *v.* Boswell . . . 19, 37*
v. Davey 213
Dublin and Wicklow Railway Co. *v.* Black 82, 636
Dubois *v.* Ludert 483, 508
Ducarry *v.* Gill 340, 346
Duchess of Kingston's case . . 527
Duckett *v.* Gover 884
Dudgeon *v.* O'Connell . . 277, 278
Dudley and West Bromwich Banking Co. *v.* Hopkins, *ex parte*
Duff *v.* East India Co. . . 275, 276
PAGE
Duignan *v.* Walker, ... 857
Duke *v.* Andrews . . 104, 120, 625
v. Dive . 120, 121, 634, 1019
v. Forbes . . 120, 121, 634
Dumville *v.* Birkenhead, &c., Rail. Co 885
Duncan *v.* Hill (L. R. 6 Ex.) . 721, 733
(2 Brod. & Bing.) . . . 97
Duncan *v.* Lowndes . 281, 282, 339
v. Luntley . . . 877, 945
Duncuft *v.* Albrecht . 674, 675, 713
Dundalk, &c., Railway Co. *v.* Tapster 1033
Dundonald *v.* Masterman . . 303
Dunne *v.* English . . . 573,* 591
Dunnicliffe *v.* Mallett 68
Dunstan *v.* The Imperial Gas Co., 353, 547, 589, 767
Durham's case, 377, 379, 381, 382, 628
Durham County Permanent Investment Co. See Davis's case
Dutch West India Co. *v.* Moses, . 211
Dutton *v.* Morrison . . 688, 690
Duvergier *v.* Fellows . 189, 192, 193,* 197
Dyke *v.* Brewer 391*

EAGER *v.* Barnes 305
Eagle Insurance Co., *ex parte*, 252, 255,* 357
Eaglesfield *v.* Marquis of Londonderry. 367
Eales *v.* Cumberland Black Lead Co. 543, 562
Eardley *v.* Law 533
Eason *v.* Henderson . . . 1022
East Anglican Railway Co. *v.* Eastern Union Rail. Co. . 281, 608
East of England Bank . . 697
See Bugg's case
Gloucestershire Railway *v.* Bartholomew . . 1 5, 132, 140, 157, 158
India Co. *v.* Blake . 779, 871
London Waterworks Co *v.* Bailey 352
Kongsberg Co.
See Bigg's case
Pant du, &c., Mining Co. *v.* Merryweather, 548, 899
Wheal Martha Mining Co., 143, 174
Easterbrook *v.* Barker . . . 38
Eastern Counties Junction and Southend Railway Co. See Mainwaring's case.
Eastern Counties Railway Co. *v.* Broom 300

PAGE

Eastern Union Rail. Co. *v.* Cockrane 214
v. Symonds, 633, 1035
Eastwick *v.* Coningsby . . . 1011
Eastwood *v.* Bain . . 340, 347, 367
Ebbett's case 82, 83
Ebbw Vale Co. (8 Eq.) 290, 262, 354
Vale Steel Co. (4 Ch. D.) . 620
Ecclesiastical Commissioners *v.* Merral 352
Eckhardt *v.* Wilson 491
Eddie *v.* Davidson 689
Edger *v.* Knapp 1022
Edie *v.* East India Co. . . . 354
Edinburgh, &c., Railway Co. *v.* Hebblewhite . 543, 632, 640, 747 749, 750, 751
Edmiston *v.* Wright 758*
Edmonson *v.* Davis 191
Edmonds *v.* Bushell 341*
Edmundson *v.* Thompson 52*, 93, 386
Edwards *v.* Aberayron Mutual Soc. 188, 868
v. Buchanan 500
v. Cameron's Coalbrook, &c., Co. . 268, 346, 357, 525
v. Grand Junction Railway Co. . . 393,* 401, 402
v. Hall 674
v. Kilkenny Railway Co. . 127, 141, 160, 527, 538
v. Shrewsbury and Birmingham Railway Co. 886, 898, 900, 1003
Eggington *v.* Cumberledge . . 474
Ekins *v.* Brown 661
Elbinger Actien, &c., *v.* Claye . 477
Electric Telegraph Co. of Ireland, *re* 222, 233, 615
See Bunn's case.
Hoare's case.
Troup's case
Eley *v.* Positive Ass. Co. . 396, 397
Elgie *v.* Webster 1026
Elliot *v.* Brown . . 648, 665, 996
v. Davis 267, 278
Elliott *v.* Richardson 548
Ellis *v.* Colman . . 282, 586, 921
v. Kelly 189
v. Schmœck . . 49, 147, 539
v. Walker 1076
v. Watson 98
Ellison *v.* Bignold . . 192, 896
Ellston *v.* Deacon 329
Elmer *v.* Creasy 962
Emly, *ex parte* . . . 645, 649
v. Lye . . . 346, 361*
Emmerson's case 714
Emmet *v.* Bradley 410

PAGE

Empire Ass. Co.
See Bagshaw, *ex parte*
Challis's case
Leeke's case
Somerville's case
Empson's case 96
Endo *v.* Caleham 967
England *v.* Curling 579, 820, 831, 915*, 972, 994*
English, Irish, and Foreign Rolling Stock Co.
See Lyon's case
Yelland's case
English and Irish Church and University Insurance Co. . . 40*
Entwistle *v.* Davis 673
Era Assurance Society (2 J. & H.) 259, 292, 402, 606, 818
(1 W. N.) 282
See Anchor Assurance Society's case
Ernest *v.* Croysdill 593
v. Nicholls 243, 252, 292, 295, 335, 356, 357, 361, 402, 553, 606, 819
Esdaile *v.* Lund . . . 524, 525
v. Maclean 499
v. Smith 533
v. Trustwell 524
Essell *v.* Hayward 229*
Essex *v.* Essex 88, 653, 670*, 823, 847, 918
Estates Investment Co
See Ashley's case
MacNeill's case
Pawle's case
Etna Insurance Co. . . . 144, 173
European Central Railway Co
See Gustard's case
Parson's case
Syke's case
Eustace *v.* Dublin Trunk Railway 123, 142, 159
Evan *v.* Corporation of Avon . 295
Evans *v.* Buck 955
v. Coventry 381, 382, 544, 555, 593*, 594, 596, 741, 773, 776, 788, 789, 794, 904, 972, 994, 1007*, 1011
v. Curtis 208
v. Drummond 406, 408, 439, 440, 443*, 449, 450
v. Hooper 875
v. Richardson . 78, 181, 200
v. Smallcombe . 540, 740, 903
v. Stokes . . . 878, 881
v. Wood . 712, 714, 725, 730
v. Yeatherd 782
Evens' claim 464
Everet *v.* Williams . . . 183*
Everett *v.* Backhouse . . 1137

PAGE

Everth *v.* Blackburne 188
Ewart *v.* Williams 992
Ewer *v.* Ambrose 94
Ewing *v.* Osbaldiston . 191, 202, 683
Exeter and Crediton Railway Co. *v.* Buller 600, 608, 886, 899, 900, 902
Exeter, Plymouth, and Devonport Railway Co.
See Besley's case
Mathew's case
Tanner's case
Eyre, *ex parte* . . . 305, 309

Faikney *v.* Reynous . . 201
Fairburn *v.* Pearson . . . 1012
Fairholme *v.* Majoribanks . 55
Fairlie *v.* Fenton 337
v. Quin 474
Fairthorne *v.* Weston . 229, 745, 894, 950*, 995
Fairtitle *v.* Gilbert . . . 250
Faith *v.* Richmond 344*
Faldo *v.* Griffin 407
Falkland *v.* Cheney . . 838
Family Endowment Society . 465
Fannin *v.* Anderson . . . 454
Farhall *v.* Farhall . 52, 1061
Farmer *v.* Mottram . . . 524
v. Russell 203
Farquhar *v.* Hadden . 661, 1075
Farr *v.* Pearce 854, 861
Farrar *v.* Beswick . . 676, 1031
v. Deflime . . . 408
v. Hutchinson . 276, 472
Farrington *v.* Chute . . . 907
Fauntleroy's case . . . 306*
Faviell *v.* The Eastern Counties Railway Co. . . 353, 494, 888
Fawcett *v.* Laurie . 793, 1001, 1003
v. Whitehouse 569, 579*, 580, 581, 587, 789, 940, 949
Fearns *v.* Young 1078
Featherstone *v.* Cooke . . 899
v. Hunt 440, 445
Featherstonhaugh *v.* Fenwick 218, 219, 221, 574*, 661, 744, 823 832, 980, 982, 1015, 1046
v. Lee Moor Porcelain Clay Co. 284
v. Turner 73, 775, 841*, 918, 982, 983, 991*, 1072
Feiling's case . . 613, 619, 621
Felgate's case . . 169, 170*
Fell, *ex parte* . . . 654, 656
v. Burchett . . . 492, 521
Fenn's case . 93, 147, 148, 738
Fenn *v.* Craig . . 501, 502
Fennings *v.* Grenville 25, 67, 601, 1025
Fenwick's case . . . 1050

PAGE

Fenwick *v.* Wood . . . 714
Fereday *v.* Hordern . 23, 38
v. Wightwick 61, 63, 653, 972
Ferguson *v.* Wilson 367, 919, 920, 921
Fergusson *v.* Fyfe 264, 283, 443, 787
Fernihough *v.* Leader . . 876
Ffooks *v.* South Western Railway Co. . . . 708, 822, 905
Field *re* (1 Y. & C. C.) . . 697
v. Carr 425
v. Lelean 727
v. Mackenzie 140, 162, 525, 532, 533, 534
Fielden *v.* Lancashire, etc. Railway Co. 1000
Fife Banking Co., *ex parte* . 642
Figes *v.* Cutler . . 87, 1019
Figgins *v.* Ward . . 475
Financial Corporation
See Adam's case
Holmes' case (2 Ch.)
Pritchard's case
Finch, *ex parte* . . . 1041
Finkle *v.* Stacey 24
Finlay & Co. *v.* Bristol and Exeter Railway Co. . . 352, 358
Fisher *v.* Bridges . . . 201
v. Farrington . . . 1057
v. Liverpool Marine Ins. Co. 188
v. Taylor 269, 274, 362, 387, 614
Fishmongers' Co. *v.* Robertson 352, 355
Fitzgibbon *v.* Scanlan . . 574
Fitzherbert *v.* Mather . . . 287
Flanagan *v.* Great Western Rail. Co. . . 586, 590, 920, 921
Fleet *v.* Murton . . 337, 721
Fleming's case . . . 464
Flemyng *v.* Hector . . . 57*
Fletcher *v.* Crosbie . . . 499
v. Dyche 504
v. Marshall . . . 731
v. Stevenson . . . 1848
Flockton *v.* Bunning 977, 978, 979, 985*, 990, 1073, 1074
Flood *v.* Patterson . . . 459
Flower *v.* Young . . . 93
Foley, *ex parte* 191
v. Hill 963
v. Marshall . . 268, 352*,
v. Skelton . . . 454
v. Steven . . . 672
Ford, *in re* 303
v. Tynte 993
Forman *v.* Homfray . . 947, 950
Forrest *v.* Manchester and Sheffield Railway Co., 284, 599, 888, 1004
Forrester *v.* Bell 32
Forshaw, *re* 216
Forster *v.* Hale . 88*, 89, 90, 644
v. Lawson . . . 480
v. Mackreth . . 274

PAGE

Forster *v.* Harbottle 543, 545, 580, 8 8, 884, 886, 896*, 899, 902, 1003
Foster *v.* Allanson 1027
v. Crabbe 1025
v. Donald 960
v. Green 320
v. Hodgson . 963, 964*, 966
v. Oxford Railway Co. . 590
Fountain's case 177
Fountaine *v.* Carmarthen Ry. Co. 271, 829
Fowler's case 543
Fowler *v.* Churchill . . . 695, 798
v. Raynal 209
v. Rickerby . . . 525, 527
v. Wyatt 970
Fox's case (5 Eq.) 742
case (3 De G. J. & S.) . 127
Fox *v.* Clifton 19, 32, 50*, 90, 92, 98 106, 108*, 612, 626, 699
v. Frith . . . 124, 1028
v. Hanbury 230, 295, 405, 411 1025, 1030, 1031*
France *v.* White 506
Francis *v.* Doe 1024
Frankland *v.* McGusty . . . 329
v. Lamond . . 718, 719
v. Thomas 691
Franks, *ex parte* 84
Fraser *v.* Hill 189
v. Kershaw 997, 1009*, 1031, 1041
v. Whalley . . 902, 1001
Freeland *v.* Stansfield 74, 75, 997, 1009
Freeman *ex parte* 392
v. Cooke 48
v. Fairlie 808, 959, 992, 993
v. Gainsford . . . 672, 673
v. Loder 477
v. Lomas 504
v. Whitbread 1081
Freen, *ex parte* 215
French *v.* Andrade . . 504, 665
v. French. 393
v. Macale 871
v. Styring 21, 25*, 58, 61, 1026
Frend *v.* Dennett 353
Frietas *v.* Dos Santo . . . 945
Fripp *v.* Charred Railway Co. . 890
Frith *v.* Cartland 314
Fromont *v.* Coupland 20*, 648, 1827, 1030
Frost *v.* Moulton . . 218, 219
Frowd's case
Fry, *ex parte* 392
v. Russell 179
Fryer *v.* Ward 1075
Furnival *v.* Weston 293*
Fyfe *v.* Swabey 920, 1000
Fyler *v.* Fyler . . . 640, 1049

Gabriel *v.* Evill . . 28*, 386

PAGE

Gainsborough *v.* Stork . . 847
Gainsford *v.* Griffith 871
Gale *v.* Leckie . . 21, 1019
Galloway's case 270
Gallway *v.* Smithson . . . 755
Galvanized Iron Co. *v.* Westoby 127, 141 625, 634, 635
Galway *v.* Matthew 272, 328*, 332*, 333, 349*, 362, 403
Garbett *v.* Weale 692
Garden Gully Co. *v.* McLister 749, 751, 908, 911, 914, 951
Gardiner *v.* Childs . 21, 291, 339, 387
Gardner *v.* London, Chat. & Do. Ry. Co. 270, 1005
v. McCutcheon . . 576*
Gardom, *ex parte* 281
Garland, *ex parte* 36, 1047, 1060, 1062*
v. Jacomb . 267, 329, 409
Garnet Mining Co. *v.* Sutton . 512
Garrard *v.* Hardey . 182, 194*
Garrett *v.* Handley . . 477*
Garrick *v.* Taylor 667
Garstin *v.* Asplin 691
Garwood *v.* Ede 120, 121, 1020, 1021
Gaskell *v.* Chambers . 590*, 960
Geaves, *ex parte* . . . 302, 312
Geddes *v.* Wallace 18, 20, 22, 71, 781, 790, 821
Gedge *v.* Trail . . 932, 1009
Gellar, *ex parte* (1 Rose) . 36, 285
Gemmel, *ex parte* 681
General Co. for promoting Land Credit 167, 180, 196, 701
v. Horner . . 590, 594
Mining Co. 619
South American Co. . 286
George *v.* Clagett 508
Gerhard *v.* Bates . . . 106, 324, 926
German Mining Co.'s case . 760*
See Chippendale, *ex parte*
Gibbons *v.* Wilcox 98
Gibbs and West's case . . 270, 271
v. Merrill . . 81, 483
Giblett *v.* Read 861
Giblen *v.* McMullen 300
Gibson's case (2 De G. & J.) . 294
ex parte (2 Mon. & Ayr.) 657
ex parte (4 Ch) . 444, 465
v. Goldsmid . . . 918
v. Lupton 60*
v. The East India Co. 353
Gilbert's case . 627, 647, 702, 703
Gilbert *v.* Cooper . 606, 819, 1002
Giles *v.* Cornfoot 242
v. Hutt 640, 747
v. Smith 378
v. Taff Railway Co. 248*, 300
v. Continental Union Gas Co. 694
Gillan *v.* Morrison . 754, 759, 781
Gillespie *v.* Hamilton . . 232

PAGE
Gillett *v.* Thornton . . 824, 870
Gillow *v.* Lillie . . . 266
Gilpin *v.* Enderby . . 20, 23, 38
Glassington *v.* Thwaites 579, 601, 841*, 995*
Gleadon *v.* Tinkler . . . 326
Gleadow *v.* Hull Glass Co. 778, 782
Gledhill's case 102
Glengall (Earl of) *v.* Fraser . 957
Glenny *v.* Smith . . . 863
Glossup *v.* Colman . . . 81
Gloucester, Aberystwith and South Wales Railway Co. (4 De G. M. & G.) 275
See Maitland's case
Glyn *v.* Hood . . 231, 698, 699
Glynn *v.* Caulfield . . 958
Goddard *v.* Cox 422
v. Hodges 36, 127, 231, 421, 776, 1026, 1029, 1030
v. Ingram . . . 457
v. Mansfield . . . 870
Godfrey *v.* Macaulay . . 415
v. Turnbull . . . 415
Goodwin *v.* Francis . . 367
Goff *v.* Great Northern Railway Co. 300
Gold *v.* Canham . . . 998
Golding *v.* Vaughan . . . 504
Good, *ex parte* . . . 435
v. Blewitt . . . 882
Goodall *v.* Skerratt . . . 455
Gooday *v.* The Colchester Railway Co. 352
Goode *v.* Harrison . . . 80
v. De Beauvoir . . 473
v. Whitcombe . 227, 541, 808, 1006, 1008
Goodtitle *v.* Tombs . . 65
v. Woodward . . 283
Goodwin *v.* Robarts . . 709
Gordon, *ex parte* 1055
Gordon *v.* Ellis 269, 285, 471, 506*, 508*, 509*
v. Howden . . . 189
v. Pym . . . 501
v. Rutherford . . 974
v. Sea Fire and Life Assurance Co. . . . 268
Georgier *v.* Morris . . 1021*
Gorham *v.* Thompson . . 416
Gorrie *v.* Woodley . . . 208
Gough *v.* Davies . . 442*, 449
Gould, *ex parte* . . . 303
Goulding, *ex parte* . . . 331
Gouthwaite's case . 462, 533, 965
v. Duckworth . 388, 389*
Gover's case . 116, 324, 580, 924
Gowan *v.* Forster . . . 456
Gower's case (6 Eq.) . . 749
Grace *v.* Smith . 33, 34*, 37, 38
PAGE
Grady's case . 133, 134, 260, 551
Graham *v.* Birkenhead, &c., Rail. Co. 904*
v. Connell . . . 696
v. Hope . . 415, 416
v. Robertson . 491, 1028
v. Van Dieman's Land Co., 547, 749
v. Wichelo . . . 436
Grain's case . . . 381, 468
Grammar *v.* Nixon . . . 298
Grant *v.* Jackson . 93, 97, 264
v. Norway . . . 298
v. Prosser . . . 474
Graves *v.* Cook . . . 1028
v. Sawcer . . . 1031
Gray *v.* Chaplin . . 883*, 903*
v. Chiswell . . . 1054
v. Haigh . . . 808, 993
v. Lewis 282, 290, 593, 884
v. Pearson . 57, 500, 875
Grayburn *v.* Clarkson . 1067, 1082
Great Luxembourg Railway Co. *v.* Magnay . . . 587, 962
Northern and Midland Coal Co. See Currie's case
Northern Railway Co. *v.* Biddulph . 630, 631, 633
v. Kennedy . . 639, 747
Oceanic Telegraph Co. See Harward s case
Western Colliery Co. *v.* Tucker 962
Western Ins. Co. *v.* Cunliffe, 877, 945
Western Railway Co. *v.* Blake 280
v. Metropolitan Railway Co. . . . 86
v. Rushout 600, 1002, 1004
Greatrex *v.* Greatrex 808, 838, 997
Green *v.* Barrett . . 879, 954
v. Briggs . 61, 67, 68, 684
v. Britten . . . 1078
v. Deakin . . . 329
v. Greenbank . . 81
v. London General Omnibus Co. 300
v. Murray . . . 718
v. Nixon 474, 523, 524, 527, 875
v. Waring . . . 870
v. Weaver . . . 187
Greenhalgh *v.* Manchester and Birmingham Railway Co. . 399
Greenham *v.* Gray 18, 19, 21, 1026
Greenshield's case . . . 233
Greenslade *v.* Dower 267, 269, 274, 291, 387
Greenwood's case (3 De G. M. & G.) 252 334, 377,

PAGE

Gregory *v.* Hurrill 545
v. Patchett 698, 599, 605, 791, 899, 900, 904, 905
Grellier *v.* Neale 97
Greville *v.* Greville 209
Griffin *v.* Ashby 457
v. Beverly 242
Griffith's case 464
Griffeth *v.* Paget . . 618, 795
Griffiths, *in re* 452
v. Griffiths . . 216, 858
Grimes *v.* Harrison . . 592, 593
Grimwold *v.* Waddington . 242
Grisewood's case (or *ex parte*) 124, 182, 194, 701, 705, 710
v. Blaine 710
Grissell *v.* Bristowe 721, 722, 724, 729
Griswold *v.* Waddington . . 78
Groves *v.* Groves 198
Groux's Soap Co. *v.* Cooper . 177, 214
Guest *v.* Worcester Railway Co. 537, 538, 614
Guidon *v.* Robson . 97, 476, 479
Guion *v.* Trask 698
Gunn's case 102
Gunn *v.* London and Lancashire Fire Insurance Co. . . 396, 397
Gurney, *ex parte* (2 De G. Mc. & G.) 656
v. Evans . . 97, 341
v. Rawlins . . . 379
Gustard's case . . 105, 708
Guthrie, *ex parte* 496
v. Fisk 496
Gwyn *v.* Godby . . . 786

HABERSHON *v.* Blurton 230, 690, 691, 946
Hackwell *v.* Eustman . . 945
Haddon *v.* Ayers 282, 368, 742, 1025
Hadley *v.* Macdougall . . 958
Hagell *v.* Currie . . . 593, 960
Hague *v.* Dandeson . 682, 686
Haig *v.* Gray 486, 665
Haig *v.* North Bierly Union 353, 494
Hale *v.* Hale . 203, 975, 1012*, 1015
Hales *v.* Petit 661
Halfhide *v.* Fenning . . 868
Halford *v.* Cameron's Coalbrook Co. 346, 347, 357
Halket *v.* Merchant Traders' Loan and Insur. Assoc. 377, 381, 530
Hall's case (5 Ch.) . 741, 749
Hall, *ex parte* (3 Deac.) . . 892
re (15 Ir. Ch.) . . 29
v. Bainbridge 337, 483, 500
v. Barrows . . 863, 864
v. Connell 809
v. Curzon 93
v. Fennell 1062
v. Franklin 77

PAGE

Hall *v.* Hall (12 Beav. & 3 Mac. & G.) . 221, 994, 995*, 1006, 1007, 1010
(20 Beav.) . . 864
v. Huffam . . . 665
v. Noyes . . 962
v. Rougham . . 665
v. Smith . . . 349
v. The Mayor of Swansea 352
v. West . . . 343*
Hallett *v.* Dowdall 377, 378, 379, 382
Hallows *v.* Fernie 889, 891, 940, 954
Hambridge *v.* De la Croúée 474
Hambro *v.* Hull and London Fire Insurance Co. 249, 258, 283, 344, 357
Hamers' Devisees' case 405
Hamil *v.* Stokes 73, 74, 75, 927
Hamilton *v.* Smith . . 32, 781
Hammersley *v.* Knowlys . . 421
Hammond *v.* Douglas . 860, 861, 981
v. Ward 998
Hampden *v.* Walsh 197
Hamper *ex parte* 36, 37,* 38, 648, 690, 1095
Hancock *v.* Bewley . . . 68
v. Haywood 491
v. Hodgson . . 337, 379*
Hankey *v.* Hammock . . . 1063
Hannuic *v.* Goldner . . . 719
Hanslip *v.* Kitton 677
Harding *v.* Glover . 1008, 1009, 1011
Hardinge *v.* Webster 463, 523, 684, 893, 998
Hardman *v.* Booth . . . 48
Hardy *v.* Metropolitan Railway Co. 593
Hare's case . . 113, 114, 134
Hare *ex part* 645, 649
v. London and North-Western Railway Co. 135, 142, 144, 160, 885, 889, 961, 1004
v. Waring . . . 145, 713
Hargreaves *v.* Hall . . . 1018
Hargrove, *ex parte* . . 166, 188, 196
Harkness *v.* Steward . . . 927
Harman's case (1 Ch. D.) . 381, 463
Harman *v.* Johnson . 267, 303, 307*
Harmony and Montague Tin and Copper Mining Co. See Spargo's case
Harper, *ex parte* . . . 853
v. Godsell . . 285, 1031
Harrington *v.* Churchward . 43, 946
Harris' case (7 Ch.) . . 102, 104
Harris, *ex parte* (1 Mad.) . . 348
v. Amery 196
v. Farwell 443, 446*, 1052, 1056
v. Ferguson . . . 58
v. Harris . . . 663, 961
v. Hill 97
v. Nickerson . . 923

PAGE

Harris *v.* North Devon Railway Co. . 596, 741, 749, 1003
v. Royal British Bank . 522
Harrison, *ex parte* . . . 61, 67
v. Armitage . . 949, 1006
v. Barton 58
v. Brown . . . 882, 892
v. Gardner 855, 857
v. Heathorn 194*
v. Jackson 278
v. Mexican Railway 621, 622
v. Millar 188
v. Stewardson . . . 890
v. Tennant 222, 227, 228*, 229
v. Timmins . . 518, 519
v. Tysan 532
Hart's case 173
Hart *v.* Alexander . 416, 444*, 449
v. Clarke 148, 221, 744, 745, 746, 751, 787, 788, 846, 908, 910, 911*, 912, 913, 914
v. Frontino & Bolivia Mining Co. 135, 142, 144, 145, 301
Hartley's case . . 144, 173, 175
Hartley *v.* Allen 1081
v. Manton 434*
Hartop, *ex parte* . . . 337, 362
Hartridge, *ex parte* . . . 1004
Hartz *v.* Schrader . . 997, 1007
Harvey *v.* Beckwith . 57, 883, 973
v. Bignold . . . 878, 881
v. Clough . . 147, 150, 177
v. Collett . 197, 201, 883, 954
v. Crickett . . 411, 1031
v. Kay 95, 97
v. Scott 140, 142, 162, 524, 527 532, 534
v. Towers 327
Harward's case . . . 103, 543
Harwood *v.* Edwards . . . 473*
v. Law 531
Hasleham *v.* Young . . . 281
Hassel *v.* Merchant Traders' Loan and Insurance Assoc. . 379, 381
Hattersley *v.* Shelburne 606, 1002, 1003 1004
Hatton *v.* Boyle . . . 265, 474
Hawken *v.* Bourne 247, 273, 291, 334
Hawkins' case (2 K. & J.) . . 148
Hawkins *v.* Hawkins 648, 654, 657, 996
v. Maltby 714, 723, 725, 726, 730
v. Ramsbottom . . . 491
Hawkshaw *v.* Parkins 276, 278, 293, 691
Hawtayne *v.* Bourne 238, 269, 272, 273, 362
Hay's case 590
ex parte 450
v. Mair 406
v. Willoughby . . 126, 128
Hayes *v.* Sterling 122
Hayter *v.* Tucker 674

PAGE

Haythorne *v.* Lawson 480
Healey *v.* Chichester and Midhurst Rail. Co. 520, 521, 538
v. Story 349, 357
Heap *v.* Dobson 387
Heath *v.* Hubbard 67
v. Percival . 439*, 449, 1058
v. Sansom 218, 230, 327, 406*, 693
Heathcote *v.* Hulme 977, 986, 1071, 1072
v. North Staffordshire Railway Co.. 607
Heaton, *ex parte* 289, 311*, 312, 362
Hebb's case, ... 102
Hedley *v.* Bainbridge 267
Heilbut *v.* Nevill 268, 330, 471*, 491 931
Helme *v.* Smith . . 61, 236, 1029
Helsby *v.* Mears 391
Hemings *v.* Pugh 877
Henderson, *ex parte* (4 Ves.) 81, 483
v. Australian Royal Mail Steam Navigation Co. . 354
v. Eason . . . 66, 1022
v. Gilchrist 1049
v. Lacon 937*
v. Royal British Bank 140, 179, 199, 528*, 925
v. Sanderson 394
v. Wild 276, 472
Henley *v.* Sloper 1027
Hennell *v.* Strong 1078
Hennessey's (executors) case . 741
Henniker *v.* Wigg 431
Henry *v.* Great Northern Railway Co. 618, 885, 901, 1001
Heraud *v.* Leaf 240, 246
Hercy *v.* Birch 914
Hereford & South Wales Wagon Co. 396
Herkimer, the 70
Hern *v.* Nichols 298
Hernaman, *ex parte* 451
Herries *v.* Jamison 515
Herring *v.* Walround 181
Hertford, *re* Marquis of . . . 697
Hesketh *v.* Blanchard . . . 36, 1026
Heward *v.* Wheatley 640, 1049, 1065
Hewitt *v.* Price 710
Heydon *v.* Heydon 688*
Heyhoe *v.* Burge 19, 36, 37*, 56, 97
Heymann *v.* European Central Railway Co. 937
Heyne *v.* Middlemore 945
Heywood *v.* Watson, ... 1028
Hibblewhite *v.* McMorine 706, 710, 719
Hichins *v.* Congreve 569, 581*, 587, 873, 883, 891, 949 960
Hickin, *ex parte* 30
Hickman *v.* Cox 38*
Higg's case 127, 143, 173, 292, 296

PAGE
Higgen's case 451
Higgins, *ex parte* . . 451, 452
v. Hopkins, ... 242, 378
v. Sargent, ... 786
v. Senior 366, 483
Hildyard *v.* South Sea Co. . . . 301
Hill's case (9 Eq.) . . 270, 363, 766
(20 Eq.) 375, 1051
v. King . . . 787, 993
v. Manchester, &c., Waterworks Co. . . . 254, 550
Hills *v.* McRae 486, 1052, 1053, 1054, 1055, 1056
v. Nash 878
v. Giraud 673
Hindmarsh, *re* 456
Hinds, *ex parte* 644
Hippesley's case 134
Hirsch *v.* Thurn 870
Hirst *v.* Tolson 73
Hitchins *v.* Kilkenny Railway Co. 395, 521, 536, 537, 538
Hoare's case 762*
v. Contencin 370
v. Dawes, . . . 24, 60*
v. Oriental Bank Corporation 207
v. Peck 963, 964
Hobson *v.* Bass 422
Hoby *v.* Roebuck 436
Hodges, *re* 492
Hodgkinson, *re* 191
ex parte (19 Ves.) . . . 450
v. Kelly . 712, 714, 725, 730
v. National Live Stock Insurance Co. 553, 605, 741, 887, 898, 1000
Hodgson, *re* 191
v. Powis . . . 885, 1001
Hogarth *v.* Wherley 277
v. Skene 327
Holden *v.* Webber 576
Holderness *v.* Shackels . . 680, 683
Holdsworth, *ex parte* 326, 328, 743, 1047, 1060
v. Davenport 673
Hole *v.* Harrison 769
Holford *v.* Cameron's Coalbrook, &c., Co. 268
Holland *v.* King 851
v. Teed 213
Holliday, *in re* 474
v. Camsell 1025
Holloway *v.* Holloway 210
Hollwey's case 742
Hollyford Copper Mining Co. (Ir. Rep. 3 Eq.) 807
Holman *v.* Johnson 200
Holme *v.* Hammond 40*, 42, 44, 237, 1047, 1060
Holmes's case (2 DeG. M. & G.) 968
PAGE
Holmes *v.* Bell 452
v. Binney 498
v. Blogg 82
v. Higgins 31, 32, 774, 776, 1021, 1030
v. Mentze 689
v. Newcastle, &c., Abattoir Co. 605, 793
v. Symons 725, 739
Holroyd *v.* Griffiths 683
v. Holroyd 670
Holt's case (22 Beav.) . . 244, 294
1 Sim. (N. S.) 739
Holyland *v.* De Mendez . . . 853*
Home Counties, &c., Insurance Co.
See Woollaston's case
Homersham *v.* Wolverhampton Waterworks Co. 353, 356, 358, 363
Homfray *v.* Fothergill 841*, 918, 996*
Honduras, &c., Co. *v.* Lefevre 955
Honduras Rail. Co. *v.* Tucker 482, 484
Hone *v.* Flahertie 522
Hood *v.* Aston 997
Hookham *v.* Pottage . . 855, 998
Hoole *v.* Great Western Railway Co. 615, 793, 797, 885, 887, 888, 901, 1001
Hooper, *ex parte* 215
v. Keay 423
v. Lusby 283
Hope *v.* Cust 281
v. International Financial Soc. 559, 605, 606, 619, 663, 738, 745, 1002
Hopkins' Trusts (18 Eq.) . . . 1080
Hopkinson's and Underwood's case 396
Hopkinson *v.* Marquis of Exeter 745
v. Smith 191, 477
Horn *v.* Gilpin 67
v. Kilkenny, &c., Railway Co. 875
Horrell *v.* Witts 1009
Horsey's case 284
Horsfall, *ex parte* 858
Horsley *v.* Bell . . . 379, 390, 394
v. Knighton's Patent . . 69
Hort's case 381, 382, 463
Houghton, *ex parte* 644
v. Houghton 669*
Houldsworth *v.* Evans, or Houldsworth's case . . . 260, 550, 740
Houlton's case . . . 52, 404, 1060
Houriet *v.* Morris 79
Hovenden *v.* Annesley . . . 963
Howard's case . . . 106, 244, 245
Howard *v.* Shaw, ... 528, 925
v. Tucker 756
Howbeach Coal Co. *v.* Teague 246, 543, 545, 548, 561, 600, 624, 626

PAGE
Howden, *ex parte* . 285, 297, 644
Howell *v.* Brodie 29*
Hubbersty *v.* Manchester, Sheffield, &c., Railway Co. . 686, 703
Huber *v.* Steiner 455
Huddlestone's case 225
Huddlestone *v.* Goldsbury . 662, 1076
Hudson *v.* Robinson . . 348 484
Hue *v.* Richards 993
Hughes, *ex parte* 451
v. Statham 190
v. Thorpe . 186, 874, 892
Hulett's case 262, 355
Hull Flax Co. *v.* Wellesley 135, 492, 623, 636
and London Insurance Co.
See Gibson's case (2 DeG. & J.
Humble *v.* Langston 638, 706, 714, 715, 726, 729
v. Mitchell . . 674, 675
Humby's case 128
Hume *v.* Bolland 306, 315
Hunt's case (32 Beav.) . 739, 905
Hunt *v.* Gunn 662, 711
v. Hibbs 825
v. Jessel 504
v. Royal Ex. Assurance Co. 283
Hunter *v.* Belcher . . . 967, 968
v. Gibbons 455
v. Stewart (4 DeG. F. & J.) 905
Hutcheson *v.* Smith 774, 779, 788, 991
Hutchinson *v.* Sturges . . 503
v. Surrey Gas Co. . 363, 397
v. Sydney 503
v. Whitfield . 222, 844, 870
v. Wright 948
Hutt *v.* Giles 626
Hutton *v.* Bullock . . 388, 477
v. Eyre 433
v. Rossiter 1048
v. Scarborough Hotel Co. 559, 568, 606, 621, 622, 1001
v. Thompson 32
v. Upfill . . . 31, 104
Hyatt *v.* Hare 290
Hybart *v.* Parker . 148, 500, 875
Hyde *v.* Johnson . . 456, 459

Ibbotson *v.* Elam . . 1079, 1081
Ilfracombe Railway Co. *v.* Devon and Somerset Railway Co. 537, 538
v. Lord Poltimore . . 537
Imperial Bank of China *v.* Bank of Hindustan (6 Eq.) 259, 296, 547,
v. ——— (1 Ch.) . . 493
Imperial Gas Co. *v.* London Gas Co. 455

PAGE
Imperial Land Co. of Marseilles
See Harris's case
Townsend's case
Wall's case
Imperial Mercantile Credit Association
See Curtis's case
Marino's case
Payne's case
v. Coleman 313, 573,591, 597, 777
Imperial Rubber Co.
See Bush's case
Ind's case . . . 132, 619
Independent Assurance Co.
See Bird's case (1 Sim. N. S.)
Cope's case
Holt's case (1 Sim. N. S.)
Terrell's case
v. Snell 545, 886, 898, 900, 1003
Ingate *v.* Lloyd Austriaco . . 494
Inglis *v.* The Great Northern Railway Co. 158, 551, 639, 747
v. Haigh . . 454, 966
Innes *v.* Stephenson 470
Inns of Court Hotel Co. (6 Eq.) 271
International Contract Co.
See Ind's case
Levita's case
International &c. Life Ass. Soc. 464
See Gibbs and West's case
Ireton *v.* Lewis . . 878, 881
Irish Land Improvement Society
See Fry, *ex parte*
Irish Peat Co. *v.* Phillips, 126, 131*, 132*, 140, 158, 160, 636
Irish West Coast Railway Co.
See Carmichael's case
Iron Shipbuilding Co. . . . 144
Iron Ship Coating Co. *v.* Blunt 543, 562
Irvine *v.* Union Bank of Australia 252, 254, 258, 259, 260, 261*, 270, 271, 550
v. Young 968
Irving *v.* Veitch 456
Isaac, *ex parte* 492
Ives, *re* . . . 663, 704, 705

Jacaud *v.* French 276, 287, 1030, 1031
Jackey *v.* Butler 688
Jackson (2 M. D. & D.) 450
(1 Ves. J.) 390*
re (1 B. & C.) 191
(12 Eq.) 664
v. Cocker . . 123, 707, 720
v. Fairbank 457
v. Jackson . . 665, 671, 850
v. North Wales Railway Co 353
v. Ogg 966
v. Sedgwick . 821, 850, 998

PAGE

Jackson *v.* Stanhope . . . 691
v. Stopherd . . 1025, 1027
v. Turquand . . . 104
v. Woolley 459
Jacobs *v.* Seward . . . 65, 67, 1031
Jacobsen *v.* Hennekinius . . 92
Jacomb *v.* Harwood 371, 446, 449, 452, 1052, 1058
Jacques *v.* Chambers . . . 1079
Jaffray *v.* Trebain . . . 81, 483
Jaggers *v.* Binnings . . . 264
Janes *v.* Whitbread 38
Jardine *v.* McFarlane . . . 339
Jarrett *v.* Kennedy 121
Jauncy *v.* Knowles . . . 927, 929
Jebsen *v.* East and West India Dock Co. 505
Jeffreys *v.* Agra and Masterman's Bank 510
v. Gurr 352
v. Small 665, 666
v. Smith 29, 61, 62, 63, 127, 218, 230, 231, 233, 698, 700, 701, 841, 925, 954, 1013
Jekyl *v.* Gilbert 908
Jenkins *v.* Blizard . . . 416, 417
v. Hutchinson 367
v. Morris 346
v. Tucker 758
Jenner *v.* Morris 273
Jennings, *re* (1 Ir. Eq.) . . . 633
v. Baddeley . . 223*, 615
v. Broughton . 106, 929, 938*
Jervis *v.* White . . . 960, 997
Jessopp's case 742
Jessopp *v.* Lutwyche . . . 187
Jestons *v.* Brooke . . . 35, 1026
Johnes' case (1 Mer.) . . 404, 1060
Johnson, *ex parte* (27 L. J. Ch.) . 776
v. Evans . 230, 661, 688, 699
v. Gallagher 85
v. Goslett . 117, 119, 1020
v. Helleley . . . 855, 1018
v. Hudson 184
v. Peck 282
v. Perens 692*
v. Pye 81
Johnston's claim 300
v. Curtis 969
v. Moore 1081
v. Renton . . . 301, 707, 798
v. Brown 592, 595, 599, 663, 789
See Reid's case.
Shepherd's case
Warrant Finance Co.'s case.
Jolly *v.* Lord Curzon . . . 482
Jones's case (4 M. & S.) . . 644
v. Beach 369, 372
v. Bradhurst 419
v. Charlemont . . . 235, 944

PAGE

Jones *v.* Clayton 515
v. Corbett 327
v. Foxall . 978, 986, 1071
v. Garcia del Rio . . . 889
v. Harrison 121*
v. Herbert 293
v. Lloyd . 222, 224, 226, 844
v. Maund 429*
v. Noy 84, 223*, 975
v. Ogle 14, 1081
v. Pengree 963
v. Rose 891
v. Shears 209
v. Victoria Graving Dock 359
v. Welch 226
v. Yates 471
Jordan *v.* Money 923
Josephs *v.* Pebrer 192, 193*, 198, 710, 735, 755
Joy *v.* Campbell 203
Joyce, *ex parte* 190
Juggeewundas Keeka Shah *v.* Ramdos Brijbooken Das . . . 284

Kay *v.* Johnson 58, 66, 339, 368, 684
Kearns *v.* Leaf . 252, 292, 380, 1002
Keasley *v.* Codd 376
Keating *v.* Marsh . . . 306*, 309
Keay *v.* Fenwick . 444, 450, 453
Keble *v.* Thompson 312
Kedie, *ex parte* 450
Keene's Executors' case 607, 822, 1077
Kelk's case 746
Kell *v.* Nainby 478
Kellock's case 1058
Kellock *v.* Enthoven . 714, 726, 729
v. Hutton 699
Kelner *v.* Baxter . . . 368, 397
Kelsall *v.* Marshall . . 154, 945
Kemble *v.* Farren 871
v. Mills 835*
Kemp *v.* Andrews 665
v. Balls 419
Kempson *v.* Saunders . 192, 199, 715*
Kemptner, *re* 658
Kendal *v.* Wood . 278, 316, 330, 471
v. King 519
Kendall, *ex parte.* . 446, 449, 1958
v. Hamilton 369
v. Lee . . . ,855, 854, 1009
v. Panama, &c., Mail Co. 937, 940
Kensington, *ex parte* 215
Station Act 935
Kent Benefit Building Society 270, 766
v. Freehold Land Co. . 935
v. Jackson 117, 599, 739, 886, 898, 900, 904, 967, 968, 1003
Kernaghan *v.* Williams . 605, 1002
Kerridge *v.* Hesse . . . 242, 390
Kerrison *v.* Reddington . . 200

PAGE
Kershaw *v.* Matthews 735, 847, 851, 1009, 1015
Keynsham Blue Lias Co. *v.* Barker 79
Kidwelly Canal Co. *v.* Raby 111, 159*, 625
Kiffin *v.* Evans 433
Kilby *v.* Wilson 470
Kilgour *v.* Finlyson . . 362, 408, 412
Kilkenny, &c., Railway Co. *v.* Fielden 493
Killock *v.* Greg . . . 486, 879, 946
Kilshaw *v.* Jukes . 39*, 387, 388, 389
Kincaid's case, (2 Ch.) . 112, 115
Kinder *v.* Taylor 193
v. Accumulative Assurance Co. . . 218. 378, 379, 380
v. Chuck . . . 823*, 847, 918
v. Hansell 857
v. Hoare 451, 452
v. Marshall 271
v. Parental Endowment Co. 537
Kingsbridge Flour Mill Co *v.* Plymouth Grinding and Baking Co. . . 243, 292, 361, 362
Kingston's (Duchess of) case . . 527
Kinnerly *v.* Hosack . . 505, 507
Kinsman *v.* Barker 969
Kintrea's case, or Kintrea *ex parte* 173, 174, 703
Kipling *v.* Turner 213
Kirby, *ex parte* 450
v. Carr 225, 226
v. Duke of Marlborough . 421
Kirk, *ex parte* 209
v. Bell 244, 245*, 282, 625, 829
v. Blurton 211, 344*
v. Bromley Union . 353, 358
Kirkman *v.* Booth . . 1068, 1071
Kirkstall Brewery Co 620
Kirkwood *v.* Cheetham 48
Kirwan *v.* Kirwan . . 442*, 449
Kisch *v.* Central Railway of Venezuela . . 115, 830, 935*
Kitchin *v.* Wilson 474
Knebell *v.* White . . . 947, 950
Knight's case . . . 551, 570
Knight *v.* Barber . . 674, 705, 711
v. Knight 662
v. Majoribanks . . . 930*
Knowles' mortgage 286
v. Haughton . . 188, 201, 951
Knox *v.* Bushell 273
v. Gye . 963, 964*, 966*, 1073
Knudson *v.* Pybus 210
Kollman's Railway Locomotive and Carriage Improvement Co.
See Beresford's case
Ellis's case

LABOUCHERE *v.* Tupper . . 36, 1060

PAGE
Labouchere *v.* Dawson . . . 855
Lacey *v.* Hill 289, 432, 733*, 768, 1055
Lacharme *v.* Quartz Rock Mining Co. 519, 959,
Lacy *v.* Kynaston . . . 418, 433,
v. McNeile . . 277, 278
v. Woolcott 405
Laing *v.* Campbell 422, 430, 839, 925, 969
v. Reed 270
Laird *v.* Birkenhead Railway Co 355
v. Chisholm . . 978, 979
Lake *v.* Argyle . 53*, 97, 242, 397
v. Craddock . . 665, 666, 910*
v. Gibson . . 58, 665, 666
Lambert's case 294
Lambert *v.* Rendle . . 1071, 1078
Lamert *v.* Heath 731
Lamond *v.* Davall 718
Lampon *v.* Corke 434
Lamprell *v.* The Billericay Union 353, 358
Lancashire and Carlisle Railway Co. *v.* North-Western Railway Co. 607
and Cheshire Railway Co. 886
Lancaster, *ex parte* (5 Ch. D.) 911
&c. Railway Co. *v.* Heaton 825
Land Credit Co. of Ireland.
See Weikersheim's case
v. Lord Fermoy 592, 595, 596
Landman *v.* Entwistle . . 378, 379
Lane's case, . 133, 134, 260, 543, 551, 553, 737, 785
Lane, *ex parte* (De G.) . . 215
v. Williams 269, 327, 349, 370, 1051
v. Sterne 1014
Langdale, *ex parte*, . . 19, 38
Langley *v.* Oxford 947
Langmead's trusts, *in re* 285, 682*, 683, 868*
Lanyon *v.* Smith 147, 150, 177, 493, 539
Lascaridi *v.* Gurney 279
Latch *v.* Wedlake 279
Latouche *v.* Waley 208
Law, *ex parte* 342
v. Law 1069
v. London Indisputable Life Policy Co. . 380, 382, 628
v. Parnell 476
Lawe's case . . . 547, 598, 739
Lawler *v.* Kershaw 98
Lawless *v.* Anglo-Egyptian, &c., Co. 300
Lawrence's case . . 112, 115
re 303
v. Bowle 313
v. Knowles 718
v. Wynn . . 631, 892, 1033
Laws *v.* Rand 275

PAGE
Lawson *v.* Bank of London . 210
v. Morgan . 895, 998, 999, 1009
Lawton, *ex parte* . . . 876
v. Hickman . . 675, 710
v. Coles . . . 224, 1016
Leak *v.* McDowell 209
Leary *v.* Shout 228
Lee *v.* Bude, &c., Railway Co. . 538
v. Haley . . . 210, 211
v. Page 75
Leeds & Thirsk Railway Co. *v.* Fearnley, ... 82, 636
Banking Co 632
See Addinell's case.
Barrett's case (2 Dr. & Sm.)
Howard's case
Matthewman's case
Leeke's case 103, 614
Lees, *ex parte* 81
v. Jones 61, 62, 63, 221, 1013, 1017
v. Laforest . 569, 866, 1045
v. Smith . . . 188, 201
Leese *v.* Martin 474
Leeson *v.* Holt 415
Le Fanu *v.* Malcolmson . . . 481
Lefevre *v.* Boyle 479
Le Feuvre *v.* Miller 825
Lefroy *v.* Gore 241, 754, 760, 781, 782
Leiden *v.* Lawrence . . 98, 275
Leifchild's case . . . 278, 292
Leigh's estate 962
Leigh *v.* Birch 1069
Leighton *v.* Wales 1025
Leishman *v.* Cochrane 127
Lemere *v.* Elliott 393
Le Neve *v.* Le Neve 287
Leominster Canal Co. *v.* Shrewsbury and Hereford Railway Co. 355, 358, 400
Lethbridge *v.* Adams 380, 381, 382, 594
Letts and Steer, *ex parte* . . 783*
Leveck *v.* Shafto 478
Leverson *v.* Lane 329, 330
Levita's case 103
Levy *v.* Pyne 267
Lewis, *re* 686
v. Armstrong . . . 189
v. Baldwin 79
v. Billing 876
v. Bright 77
v. Carr 554
v. Edwards . 865, 1030, 1032
v. Langdon 182, 410, 860, 862*
v. Nicholson . . 367, 484
v. Reilly 266, 267, 408, 409*, 413
Liardet *v.* Adams 227
Limerick, &c., Railway Co. *v.* Fraser 493
PAGE
Limpus *v.* London General Omnibus Co. 298, 300
Lindo *v.* Lindo 434
Linsay *v.* Gibbs . . . 67, 684, 698
v. Great Northern Railway Co. . . 354, 400, 402
Lindus *v.* Melrose 268, 350, 351*, 366
Linford *v.* Provincial Horse and Cattle Insurance 248
Lingard *v.* Bromley . . . 771, 783
Lingen *v.* Simpson 661, 683, 868, 917
Lingood *v.* Eade 870
Linley *v.* Taylor 674
Linton *v.* Blakeney Industrial Soc. 492
Littledale, *ex parte*, or Littledale's case (9 Ch.) 703
Littlehampton, &c., Steamship Co. 123
See Ormerod's case
Littles, *re* 642
Littlewood *v.* Caldwell . . . 999
Liverpool Adelphi Loan Association *v.* Fairhurst 85
Liverpool Borough Bank *v.* Turner 644
v. Walker . 371, 452, 1060
See Holt's case (3 De G. & S.)
Liverpool Marine Assurance Co.
See Greenshield's case.
Livingston *v.* Ralli 868
Llanharry Hematite Iron Ore Co.
See Roney's case
Stock's case
Lloyd, *ex parte* (1 Sim. N. S.), or Lloyd's case 397
(1 G. & J.) 215
(1 Mon. & Ayr.) 285
v. Archbowle 478
v. Ashby . . . 340, 346
v. Blackburne 213
v. Crisp 712
v. Freshfield . . 269, 326, 362
v. Loaring 454, 57, 540, 882
Lobb, *ex parte* 450
Lock *v.* Lynam 578*
v. Venables 1080
Lockett *v.* Lockett . . . 956, 962
Lodge *v.* Dicas . . 438*, 439, 449
v. Prichard . 991, 992, 1054, 1055
Lofthouse's case . . 147, 461, 738
Logan *v.* Courtown . 1001, 1003, 1004
Londesborough's case 246
London Assurance Co. *v.* Bold 213, 214
v. London and Westminster Insurance Corporation 210
and Birmingham, &c., Bank 174

PAGE

London Birmingham, and Bucks Railway . . . 993
Birmingham and South Staffordshire Bank 174, 686
and Birmingham Railway Co. *v.* Winter . . 355
and Birmingham Extension, &c., Railway Co.
See Higgins, *ex parte*.
Hopkinson's case
Weiss's case
and Brighton Railway Co. *v.* London and South-Western Railway Co. . 284
v. Fairclough 140, 158, 551, 638, 747. 749, 750, 751
v. Goodwin . . . 214
and Continental Assurance Co. *v.* Redgrave 110, 112, 626
See Wise, *ex parte*
and County General Agency Ass.
See Hare's case
and County Insurance Co.
See Jessop's case
Wood and Brown's case
v. Sinnot . . . 252, 352, 354
and Grand Junction Railway Co. *v.* Freeman 140, 158
v. Graham . 131, 132, 140, 158, 636
Hamburg, and Continental Bank.
See Emmerson's case
Ward and Henry's case
India Rubber Co. (5 Eq.) 797, 806
Monetary Co. *v.* Smith . 165
and North-Western Railway Co 352
and Northern Insurance Corportion
See Stace and Worth's case
and Provincial Consolidated Coal Co. . . . 741
and Provincial Law Assurance Society *v.* London and Provincial Joint Stock Life Assurance Co. 210
and Provincial Provident Society *v.* Ashton . . 165
and Provincial Starch Co.
See Gower's case.
and Provincial Telegraph Co. 174
Long *v.* Kent 1076
v. Yonge 878, 881
Longman *v.* Pole 481

PAGE

Longworth's Executor's case (Johns. & 1 De G. F. & J.) 180, 200, 205, 551, 772*, 824
Lord *v.* Governor and Company of Copper Miners . 296, 599, 886, 900*, 1004
Los's case . . . 143, 144, 173
Loscomb *v.* Russell . . 947, 950
Lovegrove *v.* Nelson . . 20, 699*
Lovell *v.* Andrew 887
v. Hicks 56, 314*, 315, 317, 320
Low *v.* Routledge 211
Lowe *v.* Copestake 476
v. London and North Western Railway Co. 358
Lowenthal, *ex parte* 499
Lowndes *v.* Garnet and Moseley Mining Co. 763*
Loyd, *ex parte* 215
Luard's case 84, 85
Lucas *v.* Beach 31, 32, 1021, 1030
v. De La Cour . . . 479
v. Wilkinson 419
v. Williams . . . 1060
Luckie *v.* Bushby 503
v. Forsyth 931
Luckombe *v.* Ashton . . 57, 377
Ludlow *v.* Dutch Rhenish Railway Co. 745
Luff *v.* Horner 658
Lund *v.* Blanshard . 501, 502, 887, 889
Lury *v.* Pearson 869
Lyde *v.* Eastern Bengal Railway Co. . . . 605, 884, 1002
Lyon *v.* Haynes 235, 412*, 1027, 1032, 1035, 1039
v. Knowles . . . 25, 61
Lyon's case 115, 626
Lysaght *v.* Walker 430
Lyster's case . . 245, 461, 750
Lyster *v.* Dolland 665
Lyth *v.* Ault 437

McArdley *v.* Irish Iodine Co. . 352
McBirney *v.* Harran . . . 476
Macbride *v.* Lindsay 151, 879*, 880, 925, 943
Maccallum *v.* Turton . . . 717
McConnell *v.* Hector 79
McCreight *v.* Stevens . . 636, 940
MacDonald *v.* Richardson 880, 979, 985*, 1068, 1073
Macdoughall *v.* Jersey Imperial Hotel Co. . 605, 626, 793, 1001, 1002
McDowell *v.* Doyle . . . 497
McEuen *v.* West London Wharves Co. 125, 157
v. Woods 731, 732
McEwan *v.* Campbell . . . 242

PAGE

McGillivray *v.* Simson . . . 506
McGowan & Co. *v.* Dyer . . . 300
Macgregor *v.* Dover and Deal Railway Co. 281, 369
McGregor *v.* Bainbridge 56, 90, 92, 676, 677
Machell *v.* Kinnear 476
MacIlreath *v.* Margetson . 778, 784
Macintyre *v.* Belcher . 378, 380, 854
v. Connell 5, 14, 161, 695*, 696,
McIntyre *v.* Miller . . 419, 499
McIver's claim 380
McIver *v.* Humble . . 93, 416
Mackay *in re* 870
v. Commercial Bank of New Brunswick . . 318, 321
McKay *v.* Rutherford . . . 88
Mackenna, *ex parte* . . . 215
v. Parkes . . 74, 945
v. Rolt 500
Mackenzie *v.* Sligo and Shannon Railway Co. 518
McKewan's case 769
Maclae *v.* Sutherland, 266, 268, 270, 348, 351*
Maclaren *v.* Stainton . . 792
Maclean *v.* Dawson . . . 1066
v. Dunn 359
v. Kennard . . 26, 1018
McLure *v.* Ripley . 570, 909*, 930
McMahon *v.* Burchell . . 65
v. Upton . 874, 882, 891
McManus *v.* Crickett . . 298
M'Nair *v.* Fleming . . . 344
McNeill's case . . . 173, 924
M'Neill *v.* Reid 1019
McNeillie *v.* Acton . . 1063, 1064
McOwen *v.* Hunter 782
Maddeford *v.* Austwick 569, 570, 931
Maddick *v.* Marshall 49, 50, 53, 241, 242
Madgwick *v.* Wimble 735, 851, 1011, 1015
Madrid Bank
See Wilkinson's case
v. Pelly 590
Magdalena Steam Navigation Co. case . . 262, 272, 363, 787
Magdalena Steam Navigation Co. *v.* Martin 78
Maguire's case 550
Mahony *v.* East Holyford Mining Co. 245, 246, 248, 253, 275, 316
Mainwaring's case 105
Mainwaring *v.* Newman 212, 1030, 1031
Mair *v.* Glennie . . 18, 25, 37*
v. Himalaya Tea Co. . 1004
Maitland's case (4 D. G. M. & G.) 122, 242
Malachy *v.* Soper 675
Manchester and London Life Assurance 464

PAGE

Manchester, Shef. and Lincoln Railway Co. *v.* Brooks . 507
Manderston *v.* Robertson . . 456
Mangles *v.* Grand Collier Dock Co. 627
Mann's case . . . 82, 173
Manning *v.* Westerne 421
Mansell *v.* Feeney . . 961, 962
Mant *v.* Mainwaring . . . 96
March *v.* Attorney-General . 674
v. Ward 348
Mardall *v.* Thelusson . . . 503
Mare *v.* Charles . . 346, 347*
v. Malachy 879
Maria Anna and Steambank Coal and Coke Co.
See McKewan's case
Marine Estates Co. 493
Mansions' Co. . . . 270
Marino's case 171, 822
Marks, *ex parte* 851
Marine Mansions Co. . . . 270
Mariott *v.* Shaw 688
Marlow *v.* Pitfield 273
Marnham, *ex parte* 710
Marquand *v.* New York Manufactory Co. 231
Marsden *v.* Kent 1082
v. Moore 835
Marsh (2 Rose) 215
v. Keating 301, 303, 306*, 307, 309, 312*, 315
Marshall *v.* Colman 227, 541, 832, 895 998
v. Glamorgan Iron Co. . 737
v. Marshall 221
v. Queensborough (Corporation of) 355
v. Rutton 84
v. Watson 997
Marson *v.* Lund 524, 536
Martin's case, 2 Hem. & M.) 143, 172, 173
case (14 Eq.) 188
v. Bridges 457
v. Crompe 490, 665
v. Heathcote 963*
Martineau *v.* Cox 957
Martins *v.* Haigh 959
Martyn *v.* Gray . . . 50, 53, 148
v. Knowllys . . . 66, 1025
Mason *v.* Bogg 1058
v. Haddan 869
v. Rumsey 346
Massam *v.* Thorley's Cattle Food Co. 210
Master *v.* Kirton 944
Mather, *ex parte* 204
v. National Association Investment Society . . 538
Mathers *v.* Green 68
Mathew's case (3 DeG. & S.) . 103
Mathew *v.* Blackmore . . . 379

PAGE
Mathewman's case 85
Mathews, *ex parte* . . . 47, 97
v. Great Northern Railway Co. 618
Matthison *v.* Clark 470
Maturin *v.* Tredinnick 717, 925, 942, 943
Maude, *ex parte* . . 797, 807
Maudslay *v.* De Blanc . . 94, 97
Maughan *v.* Leamington Gas Co. 796*
v. Sharpe . . . 182, 208
Maund *v.* Allies 969
v. Monmouthshire Canal Co. 300
Maunsell *v.* Midland Great Western Railway Co. 266, 281, 884, 1002, 1004
Mawman *v.* Gillett 478
Maxted *v.* Paine, No. 1 712, 724, 729, 731
No. 2 712, 715, 716, 721, 722, 723, 724, 726, 728, 729, 731
Maxwell's case (20 Eq.) Trusts 1081
Maxwell *v.* Dulwich College . 355
v. Greig 486
v. Hogg 211
v. Jameson 768
v. Port Tennant Co. 586, 914, 918, 920
May *v.* Smith 417
Mayberry *v.* Brooking 209
Mayhew's case . 147, 394, 700, 708
Mayhew *v.* Eames 287
v. Herrick 67, 690, 1025, 1031*, 1032
Maynard *v.* Eaton 729, 730
Mayor, &c., of Colchester, *v.* Lowten 279, 295
Mayor of Kidderminster *v.* Hardwick. 353, 355
of Ludlow *v.* Charlton 267, 353
of Stafford *v.* Till . . 352
Mayou, *ex parte* 658
Mellor *v.* Isle of Wight Ferry Co. 522, 538
Medewe's trust 425
Medical Invalid and General Life Ass. Soc.
See Griffith's case
Spencer's case
Megrath *v.* Gray 435
Meinertzhagen, *ex parte* . 450
Melhado *v.* Hamilton 621
v. Porto Aligre, &c., Rail. Co. 396
Meliorucchi *v.* Royal Exchange Assurance Co. 682
Mellersh *v.* Keen 221, 226, 775, 855, 860, 861, 982, 983
PAGE
Mellors *v.* Shaw 269
Menier *v.* Hooper's Telegraph Co. 548, 605, 885, 886
Mercantile Trading Co.
See Schroder's case
Stringer's case
Merchant's and Tradesman's Ass. Soc. 464
Merchant Traders' Ship, Loan and Assurance Co. 379
See Talbot's case
Yelland's case
Meredith's case 377
Merionethshire Slate, &c., Co. . 107*
See Rye, *ex parte*
Merriman *v.* Ward . 425, 431, 1053
Merry *v.* Nickalls . 722, 724, 729
Merryweather *v.* Nixan . 755, 770
Mersey Docks Co. *v.* Gibbs . . 300
Mertens *v.* Haigh 959
Metcalf *v.* Bruin 213
v. Rycroft . . . 208, 475
Metropolitan Saloon Omnibus Co. *v.* Hawkins 480, 892
Meux's Executor's case . . 265, 294
v. Maltby . 502, 495, 496
Meyer's case (16 Beav.) . . . 741
Meyer, *ex parte* (DeGex) . . 327
v. Sharpe . . . 21, 648
Meymott *v.* Meymott 788
Michell *v.* Harris 970
Middleton *v.* Pollock 505
Midland, &c., Railway Company *v.* Gordon 110*, 127, 159*, 625, 635
v. Taylor 472
Midland Great Western Railway of Ireland *v.* Johnson . 353, 358
Milburn *v.* Codd . 1021, 1029, 1030
Mile's claim 340, 342*
Miles *v.* Bough 543, 551, 555, 609, 629, 632
v. Thomas 221, 234, 896, 902, 995, 1003
Milford *v.* Milford . . 970, 975
Mill *v.* Hawker 299
Millar *v.* Craig 786, 934*, 969, 970, 972, 992
Miller's case 464
Miller *v.* Douglas 329
v. Mackay . . . 576, 578
v. Miller 966
v. Mynn 516
v. Thompson 350
Milliken *v.* Milliken . . . 851
Mills, *ex parte* (6 Ch.) . . 491
(8 Ch.) 44, 45
v. British Provident Assurance Society . . . 552
v. Fowkes 420
v. Northern Rail. of Buenos Ayres 658, 793

PAGE
Mills *v.* Hanson 960
Milne *v.* Bartlett 226
Milroy *v.* Lord 720, 922
Minnitt *v.* Lord Talbot . . . 57
v. Whiney or Whitney 328, 333, 408
Mitchell's case (9 Eq.) . . 82
(6 Ch.) . . . 455, 967
v. Cockburn . . 188, 201
v. Cullen 420
v. Lapage . . 346, 488
v. Newhall 731
v. Reynolds . . . 857
v. Tarbutt . . . 373, 485
estate, *re* 673
Mixer's case 320
Moffatt *v.* Farquharson 548, 576, 645, 701, 878, 881
v. Van Millingen 1030, 1031
Moller *v.* Lambert . . . 208
Mollett *v.* Robinson . . 721, 733
Molton *v.* Camroux . . 83, 406
Mollwo, March, & Co. *v.* The Court of Wards 24, 41*, 42, 44, 46
Monmouthshire Canal Co. *v.* Kendall 549
Montefiori *v.* Lloyd . . . 214
Moody *v.* London and Brighton Railway Co. . . . 245, 248
Moore *v.* Garwood . . . 102, 119
v. Hammond 546
v. Hill 489
v. Metropolitan Rail. Co. 300
v. Rawlins . . 168, 750
Morans *v.* Armstrong . 236, 277, 326
Moravia *v.* Levy 1027
Morehouse *v.* Newton . . . 991
Moreton *v.* Hardern . . . 299
Morgan's case, or Morgan, *ex parte* 599, 604, 739*
Morgan *v.* Great Eastern Railway Co. 890
v. Marquis . 67, 405, 411, 1031
v. Rowlands 456
Morison *v.* Moat . . 833, 918, 997
v. Thompson . . . 573
Morisse *v.* Royal Brit. Bank 521, 523
Morley, *ex parte* . . 647, 657, 681
v. Baker 1027
v. Newman 870
v. Strombom . . . 689
v. White 1055
Morrice *v.* Aylmer . . 617, 1076
Morris *v.* Barrett . 642, 643, 651, 665
v. Cannan . . . 707, 710
v. Colman . . . 996*, 1006
v. Glynn 673
v. Harrison 967
v. Kearsley . 669*, 713, 917
v. Morris 935
v. Sadleir 1049

PAGE
Morrison, *ex parte* (De Gex) 246, 600
Morrow *v.* Saunders . . . 1019
Morse *v.* Wilson 22
Moseley Green Coal Co. See Fox's case.
Moss *v.* The Steam Gondola Co, 126, 136*, 141
Mosse *v.* Salt 968
Mostyn *v.* Calcott Hall Mining Co. 164
Mouflet *v.* Cole 857
Moulston *v.* Wire 474
Mowatt and Elliott's case, or Mowatt, *ex parte* . . . 781
Mowatt *v.* Londesborough 93, 119, 122, 1020
Mozley *v.* Alston 543, 884, 886, 897*, 899, 902, 1003
Moxon *v.* Bright 877
Mulford *v.* Griffin . . . 407
Mullett *v.* Hook 483
Mumford *v.* Gething . . . 857
Munnings *v.* Bury 947
Munt's case . . . 282, 739*
Munt *v.* Shrewsbury and Chester Railway Co. 605, 607, 884, 1002
Murphy *v.* O'Shea 590
Murray's (executors') case 272, 357, 553, 780
v. Bush . . . 543, 561
v. East India Co. . . 267, 354
v. Moore 474
v. Pinkett . . . 231, 684*
v. Somerville 348
v. Walter 958*
Murton, *ex parte* . . . 648, 649
Musgrave *v.* Drake 327
and Hart's case . . . 171
Musson *v.* May . . . 867, 1045
Myers *v.* Edge 213
v. Perigall 674
v. Willis 297
v. Rawson . . . 539

NASH, *ex parte* 143
v. Bryant 187
v. Hodgson 421
Nassau Phosphate Co. . 82, 163
National Alliance Assurance Co. See Ashworth's case
National Bank, *ex parte* (14 Eq.) 285, 286
National Equitable Provident Society See Wood's case (15 Eq.)
Exchange Co. of Glasgow *v.* Drew . . . 294, 318*
Guaranteed Manure Co. *v.* Donald 280
Insurance and Investment Co.

PAGE

See Abercorn's case
Cotterell's case
Patent Steam Fuel Co.
See Baker's case (1 Dr. & Sm.)
Barton's case
Worth, *ex parte*
Permanent Benefit Building Soc. . . . 363, 364
Provincial Life Ass. Soc. 464, 465
See Fleming's case
Provincial Marine Ins. Soc.
See Gilbert's case
Native Iron Ore Co. 286
Natusch *v.* Irving 601*, 602*, 603, 605, 1001
Navulshaw *v.* Brownrigg . . . 285
Naylor *v.* South Devon Railway Co. 752 1001
Neale *v.* Turton 212, 268, 1028, 1030, 1031
Neave *v.* Avery 1024
Needham *v.* Law . 498, 499, 532
Neilson, *ex parte* . . . 710, 735
Nelson *v.* Bealby . . 664, 817
Nerot *v.* Burnand 92, 230, 643, 646* 681, 1041
Nesbit *v.* Smith 768
Nesbitt *v.* Howe 484
Ness, *ex parte* 522
v. Angas . 85, 136, 162, 535*
v. Armstrong 136, 162, 535*, 1065 1077
v. Bertram 1065
v. Fenwick 524
Nettleship, *ex parte* 215
Nevins *v.* Henderson . . . 242
New Brunswick Railway Co. *v.* Boore . . 163, 170
v. Muggeridge 126, 170, 179, 635 919, 920, 924
v. Conybeare 319*
Newcastle-upon-Tyne Marine Insurance Co., *re*
See Crown's case
New Clydach Co. 270
Sombrero Phosphate Co *v.* Erlanger 324, 585*, 587, 924, 1051 1052
Newell *v.* Townsend . . 691, 997
Newen *v.* Wetten 970, 975
Newland *v.* Champion . . . 1068
Newmarch *v.* Clay . . 424*, 430
Newport, &c., Railway Co. *v.* Hawes 1033
New Quebrada Co. 175
Newry and Enniskillen Railway Co. *v.* Coombe . . . 82, 636
v. Edmunds 630, 633
v. Moss . . 127, 231, 635
Newsome *v.* Coles 51*, 410, 415, 1042

PAGE

New Theatre Co.
See Bloxam's case
Newton *v.* Belcher . 96, 242, 391
v. Daly . . 147, 291, 539
v. Liddiard . . 96, 242
v. Taylor . . . 973
Nicholls *v.* Diamond . . 346, 347*
v. Dowding . . . 92, 264
Nichol's case (2 W. N.) . 113, 392
Nichols *v.* Rosewarne . . 696
Nicholson *v.* Bradfield Union 353, 354
v. Gooch 203
v. Revill 418
v. Ricketts . . 237, 267, 342
Nickalls *v.* Furneaux . . . 730
Nicol's case, or Nicol, *ex parte* (3 De G. & J.) 244, 294, 318, 320, 322, 742
Nixon *v.* Brownlow 110, 159, 524, 536, 537, 612
v. Taff Vale Railway Co. 358
Nixon *v.* Green 537
v. Kilkenny Railway Co. 537
Nockels *v.* Crosby 118*, 122, 192, 193 1020
Noke *v.* Ingham 418
Nokes, *ex parte* 221
Nolan *v.* Fitzgerald . . . 474
Norman *v.* Mitchell 110*, 111, 612, 625, 626, 745, 751, 1001, 1002
Norris *v.* Cottle 32
v. Irish Land Co. 142, 519, 1036
North American Colonial Association *v.* Bentley . . . 638*
North Hallenbeagle Mining Co.
See Knight's case
North Kent Railway Extension Rail.
See Kincaid's case
North and South Wales Bank 286
North Stafford Steel Co. *v.* Ward 626
North Western Railway Co. *v.* McMichael 82, 158, 631, 636
Northey *v.* Johnson . 149, 460, 738
Northumberland and Durham Banking Co. 164
See Bigg's case
Dixon's case
Luard's case
See Rhode's case
Norton *v.* Cooper . . . 303
v. Florence Land Co. . 270
v. Russell 978
v. Seymour . 94*, 97, 345*
Norway *v.* Rowe . . 907*, 914
Norwegian Charcoal Iron Co.
See Mitchell's case
Norwich and Lowestoft Co. *v.* Theobald . . 415, 626
Yarn Co., *re* (22 Beav.) . 550, 609, 762, 769

PAGE

Norwich Yarn Co., etc.
See Bignold, *ex parte* East of England Banking Co.'s case
Norwich & Norfolk Permanent Benefit Building Society
See Smith's case (1 Ch. D.)
Notley, *ex parte* . . 23, 1026
Nottidge *v.* Prichard 419, 422, 432, 508
Nowell *v.* Andover Railway Co. 270
v. Nowell 807
Nunn *v.* Claxton 524
v. Lomer 524

Oakes *v.* Oakes 1076
v. Turquand 112, 115, 142, 163, 321, 924
Oakford *v.* European and American Steam Ship Co. 440*, 448, 449
Oakley *v.* Pasheller 444, 447*, 449, 867, 1052
O'Brien's case 157
O'Brien *v.* Cooke 996
O'Connor *v.* Bradshaw . 187, 196
Ogle *v.* Knipe . . . 662, 1076
Oldaker *v.* Lavender . 770, 819, 839
Oldfield *v.* Preston 1048
Oliver *v.* Hamilton 1006
O'Mealey *v.* Wilson 79
Omychund *v.* Barker 787
Onion's case 103, 105
Ord *v.* Portal . . . 476, 487, 488
O'Reily *v.* Richardson . . . 340
Oriental Commercial Bank (3 Ch.) 759, 769
(5 Ch.) 290
Financial Corporation . 451
Steam Navigation Co. *v.* Briggs . . 104, 919, 920
Ormerod's case 123
Ornamental Pyrographic Co. *v.* Brown 626
Orpen's case 703
Orr *v.* Chase . 278, 370, 485, 1052
v. Glasgow, &c., Railway Co. 544, 579, 627, 889, 898*, 1000
v. Union Bank of Scotland 301
Osborne *v.* Harper . . 1027, 1029
Other *v.* Iveson 369, 372
Ottley *v.* Browne 204*
Oundle Union Brewery Co.
See Croxton's case
Overend, Gurney & Co.
See Musgrave and Hart's case
Ward & Garfit's case
ex parte . 252, 256*, 268, 360
v. Gurney . . 593, 594
v. Gibb 593, 594
Owen, *ex parte* . 649*, 654, 657*
v. Body 38
v. Challis 119

PAGE

Owen *v.* Delamere . . . 52, 1061
v. Homan 451
v. Routh 719
v. Van Uster . 95, 291, 347*
v. Wilkinson 507
Owston *v.* Ogle 1026
Oxford and Worcester Extension and Chester Junction Railway Co.
See Barber, *re* (15 Jur.)
Sharp and James's case

Paddon *v.* Richardson . . . 1074
Page *v.* Cox . 851, 852, 853, 918
v. Newman 786
Paice *v.* Walker . . . 337, 339
Pain *v.* Harris 786
Paine *v.* Hutchinson . 714, 725, 730
v. The Strand Union . 353
Painter's case. See Richmond's and Painter's case
v. Liverpool Gas Co. . 632
Paley *v.* Field 422
Palmer, *ex parte* (6 Ch.) . . 738
re (2 A. & E.) . . . 191
Palmer's case (1 Mer.) 446, 449, 1052
v. Justice Assurance Society 278, 521
v. Mitchell . 978, 1071, 1072
Panama Mail Co. 270
and South Pacific Tel. Co. *v.* India Rubber Co. . 924
Pannell *v.* Hurley 313
Pardo *v.* Bingham 454
Pare *v.* Clegg . 181, 455, 502, 883
Pariente *v.* Lubbock . . . 209, 213
Paris Skating Rink Co. 1037
Paris *v.* Paris 1080
Parker's case, or *ex parte* (2 Ch.) 173, 701
Parker, (2 M. D. & D.) . . . 392
v. Bloxham . . 970, 1074
v. Gossage 843
v. Hills 573, 650*
v. Lewis 593, 594
v. McKenna 375, 573, 589*, 595, 789
v. Morrell 264
v. Pistor 689, 690
v. Ramsbottom 736
v. Winlow 339
Parkin *v.* Carruthers . . 407, 415
v. Fry 776
Parkinson *v.* Hanbury . . 969
Parr, *ex parte* 215
Parson's case 173
Parsons *v.* Hayward . 221, 973, 982
v. Spooner 396
Pascoe *v.* Swan 65
Patent File Co. . . 285, 286, 295

PAGE
Paterson *v.* Gandasequi . . 337
v. Ironside 498
v. Zachariah 408
Patrick *v.* Reynolds . . . 242
Patten *v.* Rea 298
Paul and Beresford's case 553, 580, 741
Pauling *v.* London and North Western Railway Co. . . 358
Pawle's case 173
Payler *v.* Homersham . . . 434
Payne's case (9 Eq.) . . . 703
Payne *v.* Brecon 825
v. Hornby . 646, 681, 1041
v. New South Wales Coal Co. . . . 363, 397
Paynter *v.* Houston . 1057, 1068
Peaceable *v.* Read . . . 1025
Peacock *v.* Peacock 91, 92. 221, 411, 540, 676, 995
Peake, *ex parte* (1 Madd.) 655, 656, 736 930, 931, 1012
Pearce *v.* Chamberlain 232, 697, 851, 1044
v. Lindsay . . . 222
Pearl *v.* Deacon 421
Pearson *v.* London and Croydon Railway Co. . . . 617
v. Skelton . . 771, 1029
Peart *v.* Universal Salvage Co. . 521
Pease *v.* Hewitt . . . 75, 228
v. Hirst . 213, 421, 456, 476
Peddell *v.* Gwyn . . . 526*
Pedder *v.* Mayor of Preston . 503
Pedgrift *v.* Chevalier . . . 189
Peek's (4 Ch.) 104
Peek *v.* Gurney 321, 324, 708, 822, 905, 924, 1051,
Peel's case . . 112, 113, 115, 163
Peel *v.* Thomas 97, 98, 112, 147, 148 539
Peele, *ex parte* 362, 392
Peirce *v.* Jersey Waterworks Co. 252, 257*, 403
Peirse *v.* Bowles 278
Pell's (5 Ch.) 614
Pellatt's case . . . 102, 103, 106
Pelly *v.* Wathen . . . 215, 216
Pemberton *v.* Oakes . . . 213, 425
Pender *v.* Lushington . . 548, 702
Pendlebury *v.* Walker . . . 495
Penhale and Lomax, &c., Co. . 175
Peninsular, West India, and Southern Bank
See Dixon's case
Penkivil *v.* Connell . . . 349*
Pennell *v.* Deffel . . . 314, 422
v. Walker 869
Penney, *ex parte* 702
v. Goode 958
Penny *v.* Pickwick 913
Penoyer *v.* Brace 515
PAGE
Penrose *v.* Martyr . . 347, 366, 384
Pentelow's case 102
Pentland *v.* Gibson 496
Perens *v.* Johnson 569, 570, 692*, 788, 946
Perrett's case 105
Perrier, *ex parte* 581
Perring *v.* Dunston 186
v. Hone . . 108, 266, 1030, 1031
Perrott *v.* Bryant 25
Perry *v.* Jackson 454
Peruvian Railway Co. . 267, 268, 290
See Crawley's case
Robinson's case
Peter *v.* Rich 769
Peters *v.* Anderson . . 420, 421
Petre *v.* Eastern Counties Railway Co. 398, 401
v. Petre 455
Petrie *v.* Hannay 201
Pettman *v.* Keble 757
Petty *v.* Smith 474
Pettyt *v.* Janeson 735, 819, 821, 847, 848*
Phelps *v.* Lyle 476, 478, 500, 542, 545
v. Prothero . . . 477
v. Sproule 972
Phene *v.* Gillan 720
Philips *v.* Knightley . . . 870
v. Philips (3 Ha.) 275, 486, 665
Philipson *v.* Egremont 395, 526, 527*
v. Tempest 524
ex parte (De G. F. & J.) 710
v. Atkinson . . 997, 1009
v. Clagett . . 293*, 294
v. Commissioners of Inland Revenue . . . 867
v. Phillips (1 M. & K.) 651*, 652*, 669, 671
v. Phillips (Finch) . . 1072
v. Turner . . . 1076
v. Ward 451
Phillpotts *v.* Jones 420
Phœnix Life Assurance Co. 259, 283, 363, 550, 601, 605
See Burges and Stock's case
Hoare's case
Phosphate of Lime Co. *v.* Green 260*, 298, 550, 741, 742, 744, 749
Phosphate Sewage Co. *v.* Hartmont 584, 586, 587, 925, 943
Picard *v.* Hine 85
Pickard *v.* Sears 48
Pickering's case (6 Ch.) 337, 398
Pickering *v.* Appleby . . 675
v. Rigby 958
v. Stevenson . 592, 605, 1002
Pidgeon *v.* Burslem . . . 187
Piercy *v.* Fynney 277, 469, 472, 507
Pierpont *v.* Brewer . . . 675

PAGE
Pigott *v.* Bayley 851
Pilbrow *v.* Pibrow's Atmospheric Co. 163, 178, 377, 378, 397, 492, 494
Pillans *v.* Harkness 754, 927*, 972
Pilling *v.* Pilling 649, 654, 787, 820
Pim's case 741
Pinckney *v.* Hall 266
Pinder *v.* Wilks 412
Pinkett *v.* Wright 231, 683, 684*, 702
Pitchford *v.* Davis . 98, 108, 612
Pitt *v.* Cholmondeley . . . 968
Plant *ex parte* . . 683, 686
Plate Glass Co. *v.* Sunley . 637, 738
Playfair *v.* Birmingham, &c., Co. 741, 1000
v. Bristol, &c., Railway Co. 1003
Plews *v.* Baker . . 869, 870
Plumbe *v.* Nield 1080
Plumer *v.* Gregory 269, 303, 308, 446, 486
Pointon *v.* Pointon 1068
Pollock *v.* Campbell 468
v. Pollock 1081
v. Stables 733*
Pontifex *v.* Midland Railway Co. 374
Ponton *v.* Dunn 852*
Poole Frederick and Blue Clay Co.
See Hartley's case
v. Knott 1065
v. Middleton . . . 702, 720
v. National Provincial, &c. Assurance Society 357, 553
Pooley *v.* Driver, 4, 19, 22, 23, 24, 41, 42, 43, 44, 45*
Pope *v.* Haman 688
Pordage *v.* Cole 834*
Port of London, &c., Assurance Co.'s case 402
Portal *v.* Emmens 125, 136, 141, 157, 159, 539, 552, 636
Porter *v.* Taylor 276
Porthouse *v.* Parker 287
Portsmouth Banking Co. . . . 968
See Horsey's case
Pott *v.* Eyton . 36, 38*, 50*, 97
v. Flather 719
Potter *v.* Commissioners of Inland Revenue 859, 867
Potts *v.* Bell 78
Poulson, *ex parte* . . . 312, 313
Poulton *v.* London and South West Railway Co. . 299, 300
Powdrell *v.* Jones 837
Powell *v.* Jessopp 674
v. Layton 374, 482
Powis *v.* Butler . 141, 179, 461, 521, 1065
v. Harding . 140, 179, 528, 9 5
Powles *v.* Page . . 161, 287, 290
Pozzi *v.* Shipton 347
PAGE
Prance *v.* Sympson . 456, 963, 964*, 967
Pratt *v.* Hutchinson . . 192, 193
Prendergast *v.* Turton 907*, 908, 914
Prentice *v.* Prentice 1016
Prescott, *ex parte* (Mon. & Ch.) 142, 162, 534
v. Buffery . 141, 162, 163, 534
Preston *v.* Grand Collier Dock Co. 627, 749, 884, 900*, 1000, 1003
v. Liverpool, &c., Railway Co. 352, 400, 401, 402
v. Melville 1080
v. Strutton . 998, 1027, 1028
Price *v.* Anderson 1080
v. Barker 433
v. Groom 29*, 38
v. Hewitt 81
v. Moulton 451
v. Taylor . . . 350*, 351
Primrose *v.* Bromley 370
Prince *v.* Prince 359
Prince of Wales Life Assurance Society, *re.* 378
Athenæum Insurance Society 255*
v. Harding 255
Princess of Reuss *v.* Bos 163, 164, 167, 704
Pritchard's case (8 Ch.) . . 614
v. Draper 264, 419
Pritt *v.* Clay . . . 969, 971, 972
Professional Life Assurance Co. 382, 770
Prole *v.* Masterman . . 778, 947*
Pulsford *v.* Richards 106, 923, 924, 937*
Puller *v.* Roe 5010

QUEENSBURY Industrial Society *v.* Pickles 492
Quincey *v.* Sharp 456

RABA *v.* Ryland 285
Rackstraw *v.* Imber 1027
Radenhurst *v.* Bates 487, 500, 874, 1026
Radcliffe *v.* Rushworth . . 20, 96
Raikes *v.* Todd 422
Raleigh, *ex parte* 450
Ralph *v.* Harvey 95, 97
Ramazotti *v.* Bowring . . 509
Ramsbottom *v.* Parker . . 930, 931
Ramsay's case 177
Ramsgate Victoria Hotel Co. *v.* Goldsmid . . 102, 103, 104
v. Montefiore . 102, 103, 104
Rance's case 629, 794
Randall *v.* Randall . . 668*, 670
v. Raper 768

PAGE

Randeker *v.* Holmes . . . 870
Randell *v.* Trimen 367
v. Saunders & Co. *v.* Thompson 869
Randleson, *ex parte* 422
Ranelagh *v.* Hayes 768
v. Melton 843
Ranger *v.* Great Western Railway Co. . . 318, 358, 871, 959
Ransford *v.* Bosanquet . . 521, 532
v. Copeland 186
Rapp *v.* Latham . . . 294, 314*
Rashdall *v.* Ford 367
Rastrick *v.* Derbyshire, &c., Railway Co. . . 141, 157, 537, 539
Rathbone *v.* Drakeford . . . 474
Rawlings *v.* Lambert 1046
Rawlins *v.* Wickham . 452, 754, 929*
Rawlinson *v.* Clarke . . 20, 1026
v. Moss 216
Rawson *v.* Samuel . . . 504, 998
Rawstone *v.* Parr . . 369, 372
Ray *v.* Davies 491
Raymond's case . . 879, 946
Raynard *v.* Chase 184
Read *v.* Blunt 1079
v. Bowers . . 997, 1007
Reade *v.* Bentley 21
Reade *v.* Woodroofe 962
Reddish *v.* Pinnock 892
Redmayne *v.* Forster 699, 700, 879 946, 951
Redpath *v.* Wigg 38
Redway *v.* Sweeting 57
Reece *v.* Taylor 694
Reed *v.* White . 439, 443, 449, 450
Rees *v.* Fennie 710
Reese River Co. *v.* Smith . 175, 321
See Smith's case (2 Ch. & 4 H. L.)
Reeve *v.* Whitmore 991
Regent's Canal Ironworks . 271, 619
Reid's case 19. 82
v. Allen 379
v. Hollinshead 20, 56, 60, 285
v. Langlois 958
Reidpath's case 102
Reilly *v.* Walsh . . 570, 665, 909
Remfrey *v.* Butler 717
Rennie *v.* Clarke 242
v. Morris . . . 722, 724, 729
v. Wynn 242
Reuss (Princess of) *v.* Bos 163, 164, 167, 704
Reuter *v.* Electric Telegraph Co. 248*
R. *v.* Arnaud 78, 644
v. Aspinall . . 711, 816
v. Atkinson 873
v. Bank of England . . 1036
v. Beard . . . 497, 500
v. Berenger 711
v. Bigg 352
v. Birmingham . . . 825

PAGE

R. *v.* Bren 873
v. Burgess . . . 497, 873
v. Cambridge . . . 1038
v. Carnatic Rail. Co. . 85, 142
v. Carter 497, 500
v. Cawood, or Caywood . 192
v. Chester 1038
v. Clear 810
v. Cockermouth Inclosure Comm. 1038
v. Collector of Customs . 666
v. Cooper 550
v. Cumberland . . 353, 494
v. Derbyshire Railway Co. 522, 525, 1037
v. Dodd . . . 193*, 376
v. Esdaile . . 711, 794, 816
v. Eastern Archipelago Co. 151
v. Essex 757
v. Evans 873
v. Fox 190
v. Frankland . . 164, 199
v. Gaby 490
v. General Cemetery Co. 144, 161, 705, 1037
v. Grand Canal Co. . 810
v. Grimshaw 546
v. Gurney 816
v. Hammond 558
v. Harrald 549
v. Haythorne 150
v. Hodge 661
v. Hughes . . . 150
v. Ingall 825
v. Inns of Court Hotel Co. 703
v. James . . . 497, 500
v. Katherine Dock Co. . 1037
v. Kelk 549
v. Langhorn . . . 545
v. Langton . . . 164
v. Larwood . . . 150
v. Leech 296
v. Liverpool, Manchester, &c. Railway Co. 143, 702, 1038
v. London Insurance Co. 1036
v. Londonderry Railway Co. 631, 637, 639, 1037
v. Loose 873
v. Macdonald . . 20, 873
v. Manning . . . 299
v. Mariquita Mining Co. 809, 1037
v. Marsh 837
v. Mayor of Stamford . 353
v. Miller 151
v. Mott 613
v. Osbourne 152
v. Pasmore 150
v. Pritchard 498
v. Proud 873
v. Registrar of Joint-Stock Companies . 163, 164, 165
v. Rochester . . . 825

PAGE
R. v. Rock 661
v. Saddlers' Co. . . . 1037
v. St. Katherine Dock Co. 520, 1037
v. St. Martin's . . . 213
v. Sanderson 661
v. Scott 490
v. Shropshire Union Railway Co. 142
v. Smith 873
v. Stafford . . . 1038
v. Stainer 180
v. Stamford 353
v. Stranyforth . . . 299
v. Stratton 192
v. Tewkesbury . . . 543
v. Timothy 816
v. Victoria Park Co. 520, 628, 1036, 1037, 1038
v. Warburton . . . 873
v. Watson 816
v. Webb . . . 192, 193*
v. Webster 873
v. Whitmarsh 56, 163, 168, 178, 182, 187, 192
v. Whitstable Co. . . 1036
v. Wilts and Berks Canal Co. . . . 1037, 1038
v. Windham 1038
v. Wing . . 637, 639, 1037
v. Worcester Canal Co. . 1037
v. York 1038
Reynell v. Lewis 32, 53, 97, 178, 241*
Reynolds v. Bassett . . . 149
v. Bridge 858, 871
Rheam v. Smith 512*, 513*, 684*, 893, 954, 998
Rhodes, *ex parte* 84, 85
v. Forwood . . 378, 380, 854
v. Rhodes 788*
v. Smethurst 455
Rice v. Gordon 933, 934,* 1053, 1056 1057
Richards v. Davies . . . 949*
v. Heather 490
v. Home Assurance Ass. 103
Richardson (Buck. 202, 3 Madd.) 1063
v. Bank of England 207, 211, 805, 806, 960, 1030
v. Hastings 878, 881, 883, 952
v. Horton 372
v. Larpent . . 596, 881, 887
v. Williamson . . . 368
Riches, *re* 266, 329, 330
Richmond Hill Hotel Co. Pellatt's case
Richmond's (and Painter's) case (4 K. & J.) 628, 739, 749, 751
executors' case (3 D. G. & Sm.) 739
Richmond v. Heaphy . . 470, 472
PAGE
Ricketts v. Bennett 239, 269, 272, 273 362
v. Bowhay . . 524, 1065
Riddick v. Deposit, &c., Assurance Co.
Ridgway v. Clare . . 1055, 1057*
v. Philip . . 56, 95*, 96
v. Security, &c., Assurance Society . . . 537
Ridley v. Plymouth Grinding and Baking Co. 243, 244, 282, 357
v. Taylor . . . 327, 330
Rigby v. Dublin Trunk Railway Co. 524, 525, 537
Rigden v. Pierce . . . 847, 1015
Right v. Cuthell 283
Ripley v. Waterworth . . 668*
Rishton v. Grissell 787, 790, 946, 1015
Ritso's case 102
Roberts' case (or Roberts, *ex parte*) (1 Drew.) 103, 105
Roberts v. Cuffin . . . 969
v. Eberhardt 62, 63, 227, 651, 1005*, 1013
v. Hardy 79
Robertson v. Lockie . . 226, 844
v. Quiddington 859, 862, 1075
v. Sheward . . . 497
v. Southgate . . 784, 877
Robinson's case (4 ch.) . . 102
(6 De G. Mc. & G.) 376, 640, 760, 770, 781, 782, 1033, 1049
v. Alexander 454, 963, 965, 1045
v. Anderson 56, 92, 676, 677*, 775, 917
v. Ashton . . . 649
v. Burbridge . . . 695
v. Chartered Bank of India 702
v. Davison . . . 837
v. Field 963
v. Hadley 1010
v. Hofman 279
v. Kitchin . . . 187
v. Marchant . . . 481
v. Preston . . . 58
v. Sheward 499
v. Thompson . . 599, 967
v. Wilkinson 338, 441, 449, 483
Robley v. Brooke . . 643, 677
Robson v. Curtis 1030
v. Devon . . . 939*, 940
v. Dodds 889
v. Drummond . . 478, 489*
v. M'Creight . . 382, 948
Rock v. Lazarus . . . 208
v. Mathews 1012
Rodgers v. Maw . 436, 448, 867
Roe v. Fuller 499
Rogers' case 105
Trust 1081
Rogers v. Harvey . . . 672

PAGE
Rogers *v.* Oxford, &c., Railway Co. 605, 889, 1004
v. Price 758
Rolfe *v.* Flower . . . 392, 545
Rolling Stock Co. of Ireland
See Shackleford's case
Roney's case 544, 551
Rooth *v.* Quin . 328, 403, 416
Rosewarne *v.* Billing . . 710
v. Estates Investment Co. 936*
v. Moses 731
v. Parkyns 18, 20
Rossmore *v.* Mowatt . 589, 605
Rothwell *v.* Humphries . . 269
Routh *v.* Peach 970
v. Webster . 863, 999, 1000
Rowe *v.* Wood 63, 540, 808, 974, 1011, 1013*
Rowlands *v.* Evans 225, 843*, 1013, 1015, 1016, 1017, 1045
Rowlandson, *ex parte* (1 Rose, 89) 36, 38, 654
(1 Rose, 416, and 2 V. & B. 172)
Rowley *v.* Adams 648, 671, 933, 992, 1068
v. Horne 416
Royal Bank of Australia
See Cockburn's case
Drummond's case
Meux's (executors') case
Sutton's case
Royal Bank of India's case . 86, 254
Royal British Bank *v.* Turquand 252, 253*, 256, 270, 272, 279, 335, 829
Royal Exchange Association Co. *v.* Vaughn 150
v. Moore 715
Rudge *v.* Bowman . 710, 714
Ruffin, *ex parte* 654, 655, 656*, 680, 1040
Rumball *v.* Met. Bank 124, 709, 718
Ruppell *v.* Roberts . . 290, 338
v. Austwick 577*
v. Croysdill 493
v. Pellegrini 870
v. Reece . . . 337, 366
v. Wakefield Waterworks 884, 886
Russell's Patent 69
Russian Vysounsky Ironworks Co. 108*
See Stewart's case
Taite's case
Webster's case
Whitehouse's case
Rutter *v.* Chapman . . . 151
Ryall *v.* Rowles 682
Ryan, *re* 665
v. Mackmath 407
Rye's case (or Rye, *ex parte*) . 107
Ryland *v.* De Lisle . . . 1034

Sadler *v.* Lee 84, 224, 304*, 313, 374, 375, 1052
v. Nixon 1029
Sahlgreen and Carrall's case 102
St. Aubyn *v.* Smart . 303, 304, 310
St. James's Club 57
Sainter *v.* Ferguson . . . 871
Salman *v.* Hamburg Co. . . 519
Salomons *v.* Laing 606, 884, 901, 1001, 1002
v. Nissen . . 287, 470
Saltoun *v.* Houston . . . 867
Sander *v.* Sander 226
Sanders *v.* Guardians of St. Neotts 353
v. King 961
Sanderson's case (3 De G. & S.) 394
v. Brooksbank . . . 327
Sandford *v.* Ballard . . . 65
Sandilands *v.* Marsh . . . 281*
Sangster *v.* Mazareddo . 95, 97, 264
Sankey Brook Coal Co. No. 1 . 271
No. 2 271
Sargant *v.* Read . 1008, 1010, 1013
Sargent, *ex parte* 172, 174, 703, 704, 822
Saull *v.* Browne 962
Saunders *v.* Druce 666
Saville *v.* Robertson . . . 388*
Saxon Life Assurance Soc. 402, 464, 818
See Anchor Insurance Co's case
Era Life Assur. Society's case
Sayer *v.* Bennet . 224, 225, 226
Sayles *v.* Blane . . . 706, 726
Scarth *v.* Chadwick . . . 890
Schackell *v.* Rosier . . . 755
Scholefield *v.* Heafield . . 1045
v. Redfern 1081
Scholey *v.* Central Rail. Co. of Venezuela 924
Schroder's case 614
Scott *v.* Avery 868
v. Beale . . 393, 425, 426
v. Berkeley 111
v. Colburn . . . 271, 279
v. Franklin 491
v. Godwin 475
v. Izon 904
v. Lord Ebury . 368, 397
v. Lord Hastings . . 695
v. McIntosh 1029
v. Mayor of Manchester . 300
v. Miller 190
v. Milne 903
v. Rayment 914
v. Surman 313
Scottish and Universal Finance Bank 107*
Scrimgeour's claim . . . 733
Scudemore *v.* White . . . 966
Sculthorpe *v.* Tipper . 1067, 1082

PAGE

Sea, Fire, Life Assurance Co. See Greenwood's case
Port of London Assurance Co.'s case
Seaton *v.* Grant 889
Seddon, *ex parte* 450
v. Connell 874, 879, 881, 882, 887, 891, 943, 954*
Sedgwick's case (or, *ex parte*) (2 Jur. N. S.) 777, 778, 780, 782
v. Daniell 1029
Sedgworth *v.* Overend . 480, 481
Seeley *v.* Boehm 947, 956
Seligmann *v.* Le Boutillier . . . 870
Selwyn *v.* Harrison . 759, 762, 767*
Senhouse *v.* Christian 907*, 912, 914
Serrell *v.* Derbyshire, &c., Railway Co. 347*, 358
Sewell's case 613, 619
Sewell *v.* Bridge 971
Shack *v.* Anthony 451
Shackle *v.* Baker 855
Shackleford's case 102
v. Dangerfield . . 165, 633
Shallcross *v.* Oldham . . . 576
Sharp and James's case 103
v. Dawes 545, 548
v. Milligan 283
v. Stewart & Co. . . . 620
v. Taylor 180, 204
v. Warren 1030
Sharpe *v.* Cummings . . 58, 676
v. Day 887
v. Gibbs 451
Sharpley *v.* Louth and East Coast Railway Co. 905, 925
Shaw's claim (10 Ch.) 395
ex parte (18 Eq.) . . . 173
(2 Q. B. D.) . 171, 172, 174
v. Ching 962
v. Fisher . . 145, 707, 713
v. Galt 20, 40*
v. Harvey 94
v. Holland . . 168, 719
v. Picton 786
v. Rowley . 631, 632, 719
Shears *v.* Jacob 286
Shedden *v.* Patrick 527
Sheffield's case 252
Sheffield and Hallamshire Ancient Order of Foresters See Fountain's case
&c., Gas Co. *v.* Harrison 720, 914, 919
and Manchester Railway Co. *v.* Woodcock 131*, 132, 554, 630, 631, 633, 636
Nickel Co. *v.* Unwin 252, 559, 609
Sheil, *ex parte* 45
Shepherd's case 171, 703
Shepherd *v.* Allen 226
v. Gillespie . . 714, 725, 730

PAGE

Sheppard *v.* Baillie 482
v. Murphy . . 725, 726, 730
v. Oxenford 194, 196, 198*, 203, 883, 952*, 953, 954, 1006*, 1011, 1012, 1013
Sherman *v.* Sherman 903*
Shields *v.* Great Northern Railway Co. 79
Ship's case, (2 DeG. J. & S.) 107, 173
Shipton *v.* Thornton 348
Shirreff *v.* Wilks . . 331*, 393
Shortridge *v.* Bosanquet 137*, 142, 637, 875, 1000
Showler *v.* Stoakes . . 276, 474
Shrewsbury and Birmingham Railway Co. *v.* London and North Western Railway Co. 284
Canal Co. *v.* Stour Valley Railway Co. 606
v. North Staffordshire Railway Co. . . 398, 400, 401*
Shrimpton *v* Sidmouth Railway Co. 538
Shropshire Un. Canal Co. *v.* Anderson . 141, 160, 301, 629, 635
Union Railway Co. *v.* R. 135, 145, 156
Sibley *v.* Minton . 148, 876, 882
Sibson *v.* Edgeworth 121, 882, 883, 888
Sichel *v.* Mosenthal 915
Sichell's case (3 Ch.) . . 174, 175
Siffkin *v.* Walker 348
Silver *v.* Barnes 57
Sim *v.* Sim 968
Simmons *v.* Leonard 735, 821, 847, 849*
v. Swaine 870
Simms *v.* Barry 371
Simons *v.* Johnson 434
v. Patchett 367
Simpson's case, (9 Eq.) . . . 172
Simpson, *re* (9 Ch.) 657
v. Chapman 880, 979, 986*, 1073
v. Denison 605, 607, 884, 1001, 0021
v. Henning . . 435, 447
v. Lord Howden . . . 402
v. Rand 732
v. Vaughan . 370, 452, 1051
v. Westminster Palace Hotel Co. . . 284, 599, 1004
Sims *v.* Bond 477
v. Britain 477
v. Brutton 302, 308*, 309, 310, 315, 457
Simson *v.* Cooke 213
v. Ingham . 420, 427*, 429
Singer's Manufacturing Co. *v.* Wilson 210
Singleton *v.* Selwyn 890
Skaife *v.* Jackson 472
Skeet *v.* Lindsay 967

PAGE
Skinner *v.* Lambert . 496, 892, 1033
v. Stocks . . 478, 479
Skipp *v.* Harwood 230, 661, 680, 690, 691
Skirving *v.* Williams . . 1071
Slater, *ex parte* (6 Ves.) . 418, 433
v. Lawson . . . 457
v. Willis 644
Sleech's case 313, 375, 446, 449, 1052, 1053, 1058
Slim *v.* Croucher . . . 320, 924
Slipper *v.* Sidstone . . . 504, 665
Small *v.* Attwood 313, 501, 883, 923, 938
Smallcombe's case, or Smallcombe *v.* Evans . 260, 740*, 743*, 905
Smart *v.* West Ham Union . . 353
Smith's case (4 Ch.) . . 135, 188
Smith's case (2 Ch. & 4 H. L.) . 173
Smith (3 Madd.) . . . 649
v. Baily . . . 266, 349
v. Ball 208
v. Barrow . . 1026, 1030
v. Birmingham Gas Co. . 300
v. Braine 327
v. Cork. &c., Railway Co. 618
v. Craven . . 362, 387
v. De Silva . . 680, 682
v. Duke of Chandos 820, 991
v. Everett 855, 860, 861, 933, 982, 1069, 1072
v. Fromont . . . 999
v. Goldsworthy 496, 542, 604, 606, 612*, 613, 892, 1033
v. Harrison . . . 692
v. Howth 1024
v. The Hull Glass Co. 243, 247*, 250, 255*, 259, 260, 292
v. Jameson . . 312, 436
v. Jarves 349
v. Jeyes 227, 817*, 895, 997, 998, 1006, 1011
v. Johnson . . . 268
v. Leveaux 876
v. Lindo 187
v. Mawhood 184
v. Mules 651, 833, 845, 846*, 1018
v. Oriel . . . 411, 1031
v. Parkes . . 505, 698
v. Plummer . . . 684
v. Reese River Co. 320, 880, 936*, 937, 1000, 1034
v. Smith 370, 643, 645, 649, 1076*
v. Snow 878
v. Stokes . . 411, 661, 1031
v. Watson 21, 36, 56, 276, 648
v. Wigley . . . 423
v. Winter . . 409*, 412 413
Smout *v.* Ilbury 404
Snaith *v.* Burridge . . . 330
Snell's case . . . 737, 741
PAGE
Society of Practical Knowledge *v.* Abbott 151, 250, 591*, 592*, 597, 608, 658, 949
of Attorneys, *ex parte* . 151
Solicitor-General *v.* Lord Mayor of Dublin 607
Solly *v.* Forbes 433*
Solomons *v.* Medex . . . 481
Solvency Mutual Guarantee Co. *v.* Freeman 213
Somerville's case . . 142, 173
Somerville *v.* Mackay . . . 962
Somes *v.* Currie 151, 679, 797, 820, 822
Soulby *v.* Smith 496
Southall *v.* British Mutual Life Ass. Co. . . . 1002, 1004
Southampton Dock Co. *v.* Arnett 625
v. Richards 140, 158, 551, 629
Southampton, Isle of Wight, and Portsmouth Steam Boat Co. See Bird's case (4 De G. J. & Sm.) Webb's case
Southampton Steam Boat Co. *v.* Rawlins 493
South Carolina Bank *v.* Case 342, 1483
South Eastern Railway Co. *v.* Hebblewhite . . 543, 624, 627, 629
South Essex Gas, &c., Co. See Hulett's case
South of Ireland Colliery Co. *v.* Waddle . . 352, 353, 354, 359
South Sea Co. *v.* Wymondsell . 455
South Wales Atlantic Steamship Co. . . . 196, 199
South Wales Railway Co. *v.* Redmond 280
Spackman *v.* Evans 135, 260, 550, 740, 749
v. Lattimore . 111, 395, 1002
Spargo's case 614
Spark *v.* Heslop 768
Sparks *v.* Liverpool Waterworks Co. 752
Sparling *v.* Parker . 662, 673, 674
Sparrow *v.* Chisman . . . 470
Spears *v.* Attorney-General . 661
Spence's case . . 641, 1050
Spenceley *v.* Greenwood . 408, 440
Spencer's case (6 Ch.) . . 464
v. Billing . . . 97
v. Newton 497
v. Spencer . . . 970*
Spiller *v.* Johnson . . . 499
v. Paris Skating Rink Co. 396
Spittal *v.* Smith . . 890, 931
Spottiswoode's and Amsink's case 754, 760
Sprague, *ex parte* . . 656, 657
Spurgin *v.* White 544
Spurr *v.* Cass 478

PAGE

Stables *v.* Eley 97, 299, 407, 411*
Stace and Worth's case 106, 135, 173, 292, 606
Stackwood *v.* Dunn . . . 509
Stahlsmidt *v.* Lett . . . 784
Stainbank *v.* Fernley 879, 927, 943
Stainton *v.* Carron Co. 779, 933, 964*, 969, 992, 1067*, 1069
Stanhope's case (1 Ch.) 551, 740, 743, 749
(3 De G. & S.) . . 739*
Stanley's case 271
v. Chester and Birkenhead Railway Co. 398, 401, 402
Stansfeld *v.* Levy . . . 483
Stanton Iron Co., *re* . . . 38
Staples, *in re* 392
Stark *v.* Highgate Archway Co. 268
State Fire Insurance Co. 377, 380
See Conver's claim
Meredith's claim
Stavers *v.* Curling . 25, 835*, 1026
Stead *v.* Salt 265
Steadman *v.* Arden . . . 118
Stearic Acid Co. . . . 547
Stears' case 357, 553
Stears *v.* South Essex Gas Co. 553
Stedman *v.* Smith . . . 1025
Steele *v.* Harmer . . . 268
v. Metropolitan Railway Co. 607
v. Stuart . . . 287
Steer *v.* Crowley 867
Steigenberger *v.* Carr . . 112
Steiglitz *v.* Eggington . . . 278
Stephen, *re* 1022
Stephens *v.* De Medina . . . 718
v. Reynolds . . 266, 341*
Stepenson *v.* Chiswell . . 1053
Sterndale *v.* Hankinson 422, 423*
Sterry *v.* Clifton . . 181, 190
Steuart *v.* Gladstone . . 848
Stevens *v.* Benning . 210, 489*
v. Cook . . . 787, 788
v. Guppy . . . 713
v. Midland Counties Railway Co. 300
v. South Devon Railway Co. 599 618, 680 790, 792, 886, 1003
Steven's Hospital *v.* Dyas . 355
Steward *v.* Blakeway 62, 63, 651, 653, 654, 667, 671*
v. Dunn . 162, 498, 499
v. Greaves . . 497 1037
v. Harkness . . . 927
Stewart *v.* Anglo-Californian Gold Co.. 126, 141, 145, 746
v. Cauty . . 719, 727
v. Forbes . . . 676, 677
v. Gibson . . 182, 202
Stewart's case 108, 113*, 173, 551, 740, 991

PAGE

Stock's case (4 De G. J. & S.) . 544
Stocken *v.* Dawson 680, 681, 775, 779, 934,* 983, 1073
Stocker *v.* Brocklebank 20, 21, 1026
v. Wedderburn 915, 918*, 921
Stockton Malleable Iron Co. 174, 686
Stokes *v.* Lewis . . 755, 758
Stone *v.* Marsh . 306*, 307*, 309
Stonehouse *v.* De Silva . . 491
Storm *v.* Sterling, . . . 340
Stoveld *v.* Eade . . . 430
Stracey *v.* Decey 508*
Straffon's Executors' case 134, 822
Struker *v.* Wilson . . . 1080
Strand Music Hall Co. . . . 272
Strange *v.* Lee 213
Strangford *v.* Green . . . 265
Stranton Iron and Steel Co. 548, 701, 702
Stratford and Moreton Railway Co. *v.* Stratton 631
Stray *v.* Russell 703, 712, 717, 721, 726*, 727*
Streatfield Lawrance & Co. . 650*
See Bank of England case
Street *v.* Rigby 868
Strelley *v.* Winson . . . 67, 68
Stringer's case . 629, 659, 792, 794
Strong *v.* Harvey . . . 57
Strother *v.* Willan . . . 93
Stroud *v.* Gwyer 313, 977, 979, 1074, 1078, 1081
Stuart's trusts 797
Stuart *v.* Forbes . . 676, 677
v. Lord Bute 808, 810, 957, 958
v. Ferguson . . . 716
Stubbs *v.* Lister . . 749, 752
v. Sargon . . . 208, 209
Studdy *v.* Saunders . . . 95, 97
Stupart *v.* Arrowsmith 599, 903, 904*, 967, 968
Sturge *v.* East Un. Railway Co. 618, 891
Sturgis *v.* Darell . . . 455
Sturt *v.* Mellish 903
Sturton *v.* Richardson . . 1022
Styles *v.* Cardiff Steam Boat Co. 290, 301
Sumner *v.* Powell . . 372*, 1051
Sunderland Marine Insurance Co. Kearney 378
Sunken Vessels Recovery Co. See Wood's case
Sutton *v.* Clarke . . . 485
v. Gregory . . . 266, 327
v. Tatham . 732*, 756, 757
Swan's case (or *ex parte*) (7 C. B. N. S.) 143, 707*
v. Bank of Scotland . 184
v. Steele . . 327, 341*
Swan *v.* North British Australian Co. 143, 707

PAGE
Swansea Dock Co. *v.* Levien 543, 624
Sweeting *v.* Pearce . . . 734
Sweney *v.* Smith . . 749, 751, 885
Swift *v.* Jewsbury 282, 315, 321, 339
v. Winterbotham 282, 315, 339
Swire *v.* Francis 321
v. Redman . . . 440, 448
Syers *v.* Syers . . . 20, 45, 221
Sykes' case 596
Symons' case . . . 82, 173

TAFT v. Harrison . 378, 702, 1004
Tahiti Cotton Co.
See Sargent's case
Taite's case (3 Eq.) 115
Talbot's case . . . 381, 382, 628
Tallis *v.* Tallis 858*
Tanner's case 32
Tanner *v.* Christian 339
v. Smart 455
Tasker *v.* Shepherd . . . 209*
Tatam *v.* Williams . 698, 963*, 964
Tatlock *v.* Harris 435
Tattersall *v.* Groote . . 73, 871
Taunton *v.* Royal Insurance Co. 240, 251, 599, 1004
Tavarone Mining Co.
See Pritchard's case (8 Ch.)
Tavistock Ironworks Co.
See Lyster's case
Tayler *v.* Great Indian Railway Co. 143, 718
Taylor (8 DeG. M. & G.) . . 80, 82
v. Bowers 197
v. Chichester and Midhurst Railway Co. 281
v. Crowland Gas and Coke Co. . 79, 184, 397, 522
v. Davis . . 808, 838, 997
v. Dean 948
v. Dulwich Hospital . 352, 353
v. Fields . . . 661, 690
v. Hare 72
v. Haylin 969
v. Hughes 133, 138*, 142, 637, 703, 875, 1000, 1001
v. Ifill 394
v. Kymer 430
v. Lendy 197
v. Midland Railway Co. 469, 472
v. Plumer 313
v. Rundell (11 Sim. & Cr. & Ph.) 956*
(1 Y. & C. C. & 1 Ph.) 808, 810, 957*, 958
v. Salmon 883
v. Shaw 967
v. Stray 727, 732*
(L. J. James, 7th March, 1873) 666

PAGE
Teague *v.* Hubbard . . 1030, 1031
Teasdale's case . . 619, 737, 738
Teasdale *v.* Sanderson . . 65, 66
Teed *v.* Elworthy 508
Telegraph Despatch Co. *v.* McLean 378, 380, 854
Telford *v.* Metropolitan Board of Works 607
v. Ruskin 956
Tempest *v.* Kilner . 675, 718, 719
Tenant *v.* Elliott . . 203, 204
Tench *v.* Roberts 190
Tennant, *ex parte* . . 20, 42, 46
Tepper *v.* Nichols 673
Terrell's case (2 Sim. N. S.) . 397
Terrell *v.* Hutton . . . 396, 397
Terry *v.* Terry 1075
Teversham *v.* Cameron's Coalbrook, &c., Railway Co. 272, 357, 553, 780
Tew *v.* Earl of Winterton . . 786
Thacker *v.* Shepherd 479
Thames Haven Dock Co. *v.* Hall 352, 494, 630, 1034
v. Rose 245, 542, 609, 625, 630, 829, 1034, 1037
Thames Tunnel Co. *v.* Sheldon 100, 634, 635
Thetford case 550
Thicknesse *v.* Bromilow . 267, 327
Thomas (18 Eq.) 173
Thomas's case (13 Eq.) . . . 741
Thomas *v.* Bishop . . . 346, 347*
v. Clark (18 C. B.) 148, 395
v. Clarke (2 Stark.) . . 296
v. Frazer . . . 370, 1052
v. Hobler . . 395, 888, 889
v. Shillibeer 438
v. Thomas . . . 65, 1030
v. Wells 233
Thomason *v.* Frere 491
Thompson *v.* Andrews . . . 1063
v. Brown . 419, 422, 430, 432
v. Charnock 970
v. Davenport 337
v. Dunn 962
v. Harding 140, 179, 521, 534
v. Hudson . . 421, 422
v. Lace 433
v. Percival 438*, 439, 443, 449
v. Ryan 645
v. Universal Salvage Co. 267, 521
v. Waithman . 459, 1053
v. Wesleyan Newspaper Association 268
v. Williamson . . 676, 774
Thomson *v.* Anderson . . 1008
v. Thomson . . 200, 204
Thornbury *v.* Bevill . . . 182
Thorne *v.* Smith 417
Thornton, *ex parte* 522
v. Dixon . . . 667*, 670

PAGE
Thornton *v.* Ellis . . . 1077
v. Howe 181
v. McKewan . . . 421, 422
v. Procter . . . 779*, 903
Thorp *v.* Holdsworth . . 944
Thorpe, *ex parte* . . . 329
v. Jackson . . 1052, 1053
Thwaites *v.* Richardson . . 264
Tibaldi *v.* Ellerman . 1028, 1030
Tilson *v.* Warwich Gaslight Co. 395
Times Life Assurance Co. (5 Ch.) 464
Tinkler *v.* Walpole . . . 93
Tippet *v.* Johns . . 148, 149
Tittenden *v.* Peat . . . 970
Todd *v.* Emly 57
v. Studholme . . . 303
v. Wright . . . 498
Toll *v.* Lee . . 147, 148, 149, 539
Tomlins *v.* Lawrence . . 277
Tooke, *ex parte* 631
Topping, *ex parte* . . . 1055
Torkington, *ex parte* . . . 499
Torrington *v.* Lowe . . 728
Torquay Bath Co. 166
Totterdell *v.* Fareham Brick Co. 245, 248, 359, 360, 562
Touche *v.* Metropolitan Railway Co. 396, 403
Toulmin, *ex parte* . . . 809
v. Copland 425, 808, 809, 836, 960, 961, 973, 983, 992
Towne *v.* London and Limerick Steam Ship Co. . . . 494
Townend *v.* Townend 983*, 1071, 1073
Towns *v.* Mead 454
Townsend's case . . . 102, 103*
Townsend *v.* Ash . . . 673, 945
v. Crowdy . . 1028, 1030
v. Neale 478
Townshend *v.* Devaynes . . 668*
Trade Auxiliary Co. *v.* Vickers . 899
Travis *v.* Milne 933, 947, 977, 986, 1064, 1069, 1074
Tredinnick *v.* Oliver . . 675, 697
Tredwen *v.* Bourne 95, 97, 98, 112, 147, 148, 273, 291, 539
Trinder *v.* Trinder . . . 1076
Trinity House of Hull *v.* Beadle. 549
Tripp *v.* Chard Rail Co. . . 501
Troughton *v.* Hunter . 408*, 844, 863, 999, 1042
Troup's case . . . 762, 787
Trueman, *ex parte* 1041
Tunley *v.* Evans 264
Tupper *v.* Haythorne . . . 285
v. Foulkes . . . 278
Turner, *ex parte* (3 DeG. & J.) . 710
v. Borlase . . 879, 914
v. Burkinshaw . . . 788
v. Corney . . . 992
v. Evans 857
PAGE
Turner *v.* Hill 879
v. Major 857, 860, 865*, 917, 982, 996, 1010
v. Metropolitan Live Stock Co. 126
v. Morgan . . . 65
v. Reynall 188
v. Tyacke 879
Turney *v.* Bayley . . 808, 946, 959
v. Dodwell . . . 456
Turquand, *ex parte* . . . 28, 72
v. Marshall . 550, 592, 594, 595, 596, 597, 785, 794, 810
v. Wilson 955
Twogood *v.* Swanston . . 969
Twort *v.* Twort 66
Twycross *v.* Grant 116
Twyford *v.* Trail 313
Tyrrell *v.* Hope 736

Ulverstone Railway Co. *v.* Commissioners of Inland Revenue . 705
Underhill *v.* Devereux . . . 520
Underwood *v.* Nicholls . . . 277
Union Banks of Calcutta
See Watson (3 D. G. & Sm.)
United Kingdom Shipowners' Co.
See Felgate's case
United Ports Co.
See Adam's case
Beck's case
Even's claim
Perrett's case
Wynne's case
v. Hill 493
Unity Banking Association, *ex parte* 81
Universal Banking Corporation
See Gunn's case
Rogers' case
Universal Non-Tariff Fire Insurance Co.
See Ritso's case
Universal Provident Life Association
See Daniell's case (22 Beav.)
Holt's case
Munt's case
Universal Salvage Co.
See Murray's Executor's case
University of Cambridge *v.* Baldwin 213
Usher *v.* Dauncey . . 346, 404*

Vale of Neath and South Wales Brewery Co.
See Hollwey's case
Keene's Executors' case
Lawes' case
Morgan's case
Richmond's Executors' case

PAGE
See Walter's case (3 D. & G. Sm.)
Valpy & Chaplin, *ex parte* . 286
Vance *v.* East Lancashire Railway Co. . . 605, 607, 884, 1002
Van Dieman's Land Co. *v.* Cockerell 749
Vane *v.* Cobbold . . . 120, 121
Van Sandau *v.* Moore 220, 234, 495, 874, 881, 882, 891
Varney *v.* Hickman . . . 197
Vaughan *v.* Vanderstegen . 216, 859
Venables *v.* Wood . . 21, 339
Venezuela Railway Co. *v.* Kisch 321
Venning *v.* Leckie 1026
Vere *v.* Ashby . . 96, 392, 487
Vernon *v.* Jefferys 475
v. Vawdry . . 968, 969
Vice *v.* Anson 49, 95*, 98, 108, 149*. 291, 674
v. Fleming 328, 329, 332, 403
Vickers *v.* Vickers 850
Victoria Park Co. 897*
Victoria Permanent Benefit, &c., Society
See Empson's case
Vigers *v.* Pike . . . 520, 885
Villars, *ex parte* 689
Viney *v.* Chaplin 303
Vivers *v.* Tuck 914
Vivyan *v.* Mowatt 149
Vollans *v.* Fletcher . . 102, 104
Vulliamy *v.* Noble 52, 282, 304, 374, 404, 505, 507, 880, 1052, 1060, 1061
Vyse *v.* Foster 375, 880. 958, 959, 976, 977, 978, 979, 986, 989*, 1071, 1073, 1074

WADE *v.* Jenkins . 806, 839, 864*
Wadeson *v.* Richardson . . 769*
Wadmore *v.* Dear 672
Wainwright *v.* Waterman . . 851
Wait, *re* 661, 688
Walburn *v.* Ingilby 5, 194*, 195, 887, 958
Walker, *ex parte* (4 D. G. F. & J.) 656, 658
Walker's case (8 De G. Mc. & G.) 246
(2 Jur. N. S.) 741
Walker *v.* Bartlett 149, 674, 706, 714, 726, 729
v. Broadhurst 836
v. Consett 968
v. Great Western Railway Co. 248
v. Harris 71, 1019
v. Jeffreys 906
v. Milne 673, 674
Wall's case 102

PAGE
Wallace *v.* Kelsall 278, 418, 571, 507
Waller *v.* Barrett 1048
v. Lacy 420
Wallis's case 102
Wallis *v.* Hirsh 869
Wallworth *v.* Holt 881, 882*. 951*
Walmsley *v.* Cooper 293, 418, 433. 472
v. Walmsley . . 808, 993
Walsham *v.* Stainton . . . 956
Walstab *v.* Spottiswoode 32, 119, 122, 178, 1020
Walter's second case (3 De G. & S. 244) 739
Walter *v.* Lavater 68
Walters *v.* Smith 417, 418
Walton, *re* 1065
v. Butler 645
Want *v.* Reece 1026
Warburton *v.* Hill 695
Ward, *ex parte* (L. R. 3 Ex.) . 125
v. Apprice 808
v. Comb 1080
v. Londesborough . . . 119
v. Sittingbourne, &c., Railway Co. 888
v. Society of Attorneys 150, 606*, 607, 1002
v. South Eastern Railway Co. 135, 142, 143, 144, 160, 664, 709
Ward *v.* Ward 1067
(L. R. 3 Ex.) . . 171, 174
Ward's case (10 Eq.) 102
and Garfit's case . . . 171
and Henry's case . . . 171
Warde's case. . . 304, 374, 1052
Warden *v.* Jones 931
Warder *v.* Stilwell 842, 895, 994, 998
Ware *v.* Cumberledge 674
v. Grand Junction Waterworks Co. . . . 607, 1004
v. Regent's Canal Co. . 494
Warner *v.* Cunningham . . . 222
v. Smith 678, 973
Warrant Finance Co.'s case (4 Ch.) 421
Warren's Blacking Co.
See Pentelow's case
Warwick *v.* Slade 756
Washoe Mining Co. *v.* Ferguson 493
Waterer *v.* Waterer . 651, 652, 653*, 670*
Waterfall, *ex parte* 451
Waterford, Wexford, &c., Railway Co. *v.* Dalbiac . . 626
v. Logan 637
v. Pidcock 126, 127, 132, 141*, 157, 160, 635.
Waterhouse *v.* Jamieson . 614, 664
Waterloo Insurance Co. (31 Beav.) 176
Waterlow *v.* Sharp 273
See Paul and Beresford's case

PAGE

Waters *v.* Paynter . . . 487
v. Taylor 224, 227, 689, 868, 895, 896, 999, 1003, 1006, 1017
v. Towers 469
Watkins *v.* Clark 514
v. Huntley 715
Watney *v.* Wells . 228, 787, 974, 976
Watson *ex parte*, 3 (DeG. & S.) 876
(16 Ves.) 81
(19 Ves.) . . . 38, 47, 48
(2 V. & B.) 312
v. Charlemont 93, 123*, 242, 926
v. Eales 631, 633, 639*, 751, 844 1001
v. Mid-Wales Railway Co. 510, 514
v. Spratley . . 662, 674, 675
v. Woodman 459
Watts *v.* Brookes . . 188, 200, 784
v. Christie 507
v. Porter 695
v. Rees 503
v. Salter . . 93, 120, 121
Waugh *v.* Carver 33, 35*, 47, 49
Way *v.* Bassett . . 457, 966, 1053
Weald of Kent Canal Co. *v.* Robinson 640, 1049
Weaver *v.* Prentice 93, 98
Webb's case 144
Webb, *re* 778, 784
v. Commissioners of Herne Bay 250, 256*
v. Earle 618, 797
v. Ledsam 411
v. Taylor 498
Webber *v.* Tivill . . 454, 490, 966
Webster's case, 2 Eq. 108, 112, 113*, 173
v. Bray 92, 676, 677, 775, 788
v. Webster 52, 404, 410, 862*, 916*, 1060
Wedderburn *v.* Wedderburn 860, 861, 934*, 965, 972, 974, 987* 1073
See Anderson's case (7 Ch. D.)
Weekley *v.* Weekley . . 673, 674
Weeks *v.* Propert 367
Weikersheim's case . 140, 208, 287
Weir *v.* Barnett 324
Weiss, *in re* 493, 521
Welford *v.* Liddel 963
Welland Railway Co. *v.* Berrie 632
v. Blake . . . 629, 1033
Wells *v.* Masterman . . . 329
v. Mayor of Hull . . 354
v. Ross 1020
v. Wells 1027
v. Williams 79
Wentworth *v.* Chevell . 1049, 1079
West Cornwall Rail. Co. *v.* Mowatt . 157, 271, 615
Ham Distillery Co.
See Whittet's case.

PAGE

West London Railway Co. *v.* Bernard 557
v. Skip 661, 680, 681, 777, 973
Western Bank of Scotland *v.* Addie 318, 321
v. Bairds 594*
v. Needell 406
of Canada Oil Co. *v.* Walker 493
Weston's case (4 Ch.) . . 701, 702
Weston *v.* Barton 213
Westropp *v.* Solomon . 715, 734*
Weymouth *v.* Boyer 878
Wharton *v.* May 968
Whately *v.* Menheim 98
Wheatley, *ex part* . . . 362
v. Westminster, etc., Coal Co. 869
Wheeler, *ex parte* . . . 654, 657*
v. Horne 65, 67
v. Van Wart 221, 234, 878, 881
Whincup *v.* Hughes . . . 72, 73
Whitcomb *v.* Whiting . 456, 458
White *ex parte* 311
v. Ansdell 1025
v. Barker 956
v. Barton 960
v. Carmarthen Railway Co. 271, 889
v. Williams 278
Whitehead *v.* Barron . . . 390
v. Hughes . . . 473, 491
v. Whitehead . . . 1081
Whitehouse's case 115
Whitfield *v.* South-Eastern Railway Co. 300
Whitley *v.* Lowe . 963, 967, 1014
Whitmore, *ex parte* 392*, 445, 450
v. Mason 850
Whittaker *v.* Howe, 857, 859, 917, 997
Whittet's case 141
Whittingstall *v.* Grover . . . 1054
Whittle *v.* McFarlane . . . 774
Whitwell *v.* Arthur . . . 225
v. Perrin . . 338, 450, 453
Whitworth, *ex parte* 425
v. Davis 946
Wickham *v.* Wickham 264, 294, 420, 431*
Wier *v.* Tucker 962
Wigan *v.* Fowler 186
Wightman *v.* Townroe 36, 1047, 1060
Wilby *v.* West Cornwall Railway Co. 280
Wild *v.* Milne . 61, 1015, 1016, 1017
Wilde *v.* Keep 345
v. Stannar 521
Wiles *v.* Woodward . . . 1025
Wilkins *v.* Roebuck 396
Wilkinson's case 112, 115
Wilkinson *v.* Anglo-California Gold Co. . . 126, 141, 145
v. Frazier 25, 37*

PAGE
Wilkinson *v.* Henderson 878, 949, 1052, 1053
v. Lloyd . . . 703, 712
v. Page 870
v. Torkington 915
Wilks *v.* Back 337
Willes *v.* Greenhill 289
Willesford *v.* Watson . . . 869
Willett *v.* Chambers . . 303*, 308
v. Blanford . 976, 980*, 1073
Willey *v.* Parratt . . 120, 121
Williams, *ex parte* (Buck) . 392
(2 Eq.) 587
(11 Ves.) 230, 411, 654. 657*, 680, 1041
v. Archer . . . 719
v. Aspinwall . . . 532
v. Barton . 67, 1025, 1031
v. Beaumont . . 497, 480
v. Bingley . . . 997
v. Griffiths . . 420, 966
v. Jones 88, 190, 197, 386, 831
v. Keats . . 51, 97, 407
v. Mudie 92
v. Page 903
v. Pigott 242
v. Powell . . 986, 1071
v. Prince of Wales' Life Co. 809, 810, 959, 1002
v. Rawlinson . . 421, 425
v. Rowlands 225*, 843, 1013, 1015, 1017
v. Salmond . 883, 888, 889
v. St. George's Harbor Co. 355 400*, 474
v. Swansea Harbor Trustees 324
v. Thomas 346
v. Trye 710
v. Williams (2 Swanst.) . 857*
(1 Wils. Ch.) . . . 917
(2 Ch.) . . . 88, 92, 651
Williamson, *ex parte* (5 Ch.) 270, 363 766
v. Johnson 345*
Willis *v.* Bank of England . . 287
v. De Castro . . . 433
v. Dyson . 328, 333, 403
v. Jernigan . . . 967
Willison *v.* Patteson . . 78, 79
Wills *v.* Bridge 705
v. Murray 140, 546, 547, 630, 640, 1049
v. Sutherland . 496, 892, 1033
Wilmer *v.* Currie . . 373*, 1051
Wilmot *v.* Corporation of Coventry 352 353
Willsford *v.* Wood . . 96, 487
Wilson's case (8 Eq.) . . . 173
(5 De G. & S.) . . . 1065
(3 *ib.*) 366

PAGE
Wilson *v.* Bailey 331
v. Barthrop 341
v. Birkenhead, &c., Railway Co 639, 1033
v. Caledonian Railway Co . 155
v. Craven 498
v. Curzon . . 776, 1021
v. Cutting 1025
v. Goodman 774
v. Greenwood 411, 847, 850, 945, 972, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1041
v. Hurst 430
v. Johnstone . . . 75
v. Keating 720
v. Lewis . . . 90, 331
v. Lloyd 435, 444, 447, 449, 1052
v. Miers, . . 296*, 367
v. Moore . 313, 375, 1073
v. Northampton, &c., Railway Co. . . . 956
v. Stanhope . 883, 952, 954
v. Tumman . . 390, 397
v. West Hartlepool Railway Co. . 248*, 355, 359
v. Whitehead 21, 291, 339, 387*, 648
v. Wilson . . 543, 545
Wilts and Berks Canal Co. . 810
Winch *v.* Birkenhead, &c. Railway Co. 284, 295, 606, 608, 886, 901, 1002, 1004
v. Keeley . . . 491
Wingfield *v.* Barton . 521, 539
v. Peel 521
Winne *v.* Bampton . . . 352
Winter *v.* Innes 446, 449, 457, 966, 1052
Wintle *v.* Crowther . 327, 341
Wise, *ex parte* . . . 876
Wish *v* Small 37
Withington *v.* Herring . 20, 36
Wittenburg *v.* Law . . . 532
Witts *v.* Steere 1080
Wolfe *v.* Horncastle . . . 757
Wollaston's case
See Wollaston
Wolverhampton Waterworks Co.
v. Hawkesford 140, 141, 157, 636, 1033
Womersly *v.* Merritt . . 196
Wontner *v.* Shairp 104, 121, 242, 1020
Wood's case (15 Eq.) . . . 175
claim and Brown's claim, 262, 364, 614
Wood *v.* Argyll . 32, 53*, 97, 242
v. Braddick . . 264, 436
v. Finch 57
v. Marston 499
v. Scoles . . 806, 807, 840

PAGE
Wood *v.* Wilson 870
v. Woad 745, 751, 820, 844, 932
Woodhams *v.* Anglo-Australian Co. 262, 514, 523, 875, 893,
Woodin, *ex parte* 312
Woodward, *ex parte* 457
v. Gyles 871
Wooldridge *v.* Norris 768
Woolf *v.* City Steam Boat Co. 468
Woollaston's case 750
Woolley *v.* Bate . . . 771, 1029
v. Gordon . . . 1057, 1068
v. Kelly 376
Woolmer *v.* Toby . 120, 500, 1019
Worcester Corn Exchange Co., *in re* 269, 272, 287, 362, 379, ,754 762, 765*, 781
Wormwell *v.* Hailstone . 518, 519
Worrall *v.* Grayson . . . 1029
Worth, *ex parte*, or Worth's case 323
Worthington *v.* Sudlow . . . 378
Worts *v.* Pern 92, 97
Wray *v.* Hutchinson . . . 227
v. Milestone . . . 1027
Wrexham *v.* Huddlestone . 224
Wright's case (7 Ch. and 12 Eq.) 737 742
v. Campbell . . . 355
v. Court 264
v. Hunter 781, 945, 947, 1029
v. Laing 421
v. Pulham 408
v. Russell 213
v. Snowe 81
v. Tuckett 1080
v. Warren 1079
v. Welbie 215
PAGE
Wrightson *v.* Pullan . 408, 415
Wrysgan Co. See Humby's case
Wyall *v.* Darenth Railway Co. 537
Wyatt *v.* Hodgson 456
v. Metropolitan Board of Works 1022
Wych *v.* East India Co. . . 455
Wyld, *ex parte* 876
v. Hopkins 32, 53, 178, 241*
Wynget *v.* Heathcote . . 62, 63
Wynne's case 105, 113
Wynne *v.* Price 707, 720, 725, 730

YALLOP, *ex parte* 644
Yarborough *v.* Bank of England 300
Yates *v.* Nash 340
Yeatman *v.* Yeatman . . . 1069
Yelland's case 128
Yetts *v.* Norfolk Railway Co. 627, 886, 898, 1003
York Building Co. 628
York and North Midland Railway Co. *v.* Hudson 588*, 605, 766*, 776*
Yorkshire Fibre Co. 809
Young, *ex parte* 61, 67
v. Axtell 97
v. Brompton Waters Co. 494
v. Cole 732
v. English . . . 420, 421
v. Goodson 474
v. Hunter . 389, 390*, 487
v. Keighley 690
v. Smith 710
v. White 277

ZULUETA's claim . . 258, 292

TABLE OF AMERICAN CASES.

[The references are to the marginal pages.]

	PAGE
ABAT *v.* Pinney	488
Abbot's appeal	652
Abbot *v.* Johnson	601, 822
Abernathy *v.* Latimore	468
Abpt *v.* Miller	266
Abraham *v.* Hall	236
Abrahams *v.* Hunt	968
v. Meyers	227
Ackles *v.* Stockle	295
Adams' Bank *v.* Rice	18, 27
Adams *v.* Carter	33
v. Funk	19, 1027
v. Fulton	1025
v. Gaubert	945
v. Paige	1054, 1055
v. Ruggles	266
v. Sturges	1054
v. Ward	666
v. Woods	488
Adee *v.* Demorest	269
Addison *v.* Burckmyer	682
Adkins *v.* Arthur	392
Adler *v.* Foster	440
Ætna Ins. Co. *v.* Peck	448, 449
Aiken *v.* Ogilvie	783
v. Thompson	436
Albe *v.* Wachter	991
Alcott *v.* Strong	92, 264
Alexander *v.* Alexander	1026
v. Coulter	1060
v. Kimbro	652
v. Lewis	832
v. State	303
v. Stern	475
Alfele *v.* Wright	643
Allen *v.* Blanchard	760
v. Butler	483
v. Centre Valley Co.	655
v. Coit	991
v. Clarke	1095
v. Davis	17, 1029
v. Dunn	1054
Allen *v.* Farrington	275
v. Hawley	680
v. Hill	1045
v. Owens	264
v. Rostain	98
v. Wells	1054
Allison *v.* Davidson	655, 658, 783
Alsop *v.* Mather	1053
Altman *v.* Altman	1016
Alvord *v.* Smith	699
Ambler *v.* Bradley	17, 20
v. Whipple	222, 227
American Bank *v.* Doolittle	433
American Bank Note Co. *v.* Edson	572, 574
American Cent. R. R. Co. *v.* Miles	467
v. Wortendyke	416
American Ins. Co. *v.* Coster	56
Ames *v.* Downing	231, 383
Amidown *v.* Osgood	406
Anderson *v.* Beebe	972
v. Cheney	689
v. Lemon	574
v. Levan	92, 451
v. Powell	198
v. Robertson	1028
v. Snow	95
v. Tarpley	412
v. Taylor	774
v. Tompkins	266, 652
v. Whitlock	572
Andrews *v.* Brown	652, 664, 666
v. Ennis	468
v. Keith	689, 690
v. Mann	683
v. Planter's Bank	266, 281
v. Schott	383
Anthony *v.* Wheatons	541
Angier *v.* Webber	857
Angle *v.* Mississippi, etc., R. R. Co.	231
Appleton *v.* Smith	33

PAGE

Argal *v.* Smith . 383
Armstrong *v.* Crocker . . 961
v. Fahnstock . . 222
v. Robenson . . 265
Arnold *v.* Angell . . . 945
v. Brown . 223, 228, 295, 691
v. Camp . . . 440
v. Hamer . . . 1054
v. Stevenson . . . 652
v. Wainwright . . 652
Artisans' Bank *v.* Treadwell . 383, 483
Asken *v.* Odenheimer . . 809
Aspenwall *v.* Williams . 27, 341
Atherton *v.* Tilton . . . 20
Atkinson *v.* Rogers . . . 945
Atkin *v.* Berry . . . 239
Atkins *v.* Hunt . . . 18
v. Saxton . . 655, 690
Atlantic Bank *v.* Savery . . 290
Atlas Nat'l Bank *v.* Savery . 266
Atwood *v.* Gillett . . . 224
v. Lockhart . . . 392
v. Meredith . . . 639
v. Smith . . . 222
Auburn, etc., Bank *v.* Fitch . 655
Auld *v.* Butler . . . 967
Aultman, etc. Co., *v.* Webber . 287
Austin *v.* Cummings . . . 867
v. Holland . . 406, 415
v. Thompson . . . 15
v. Vaughan . . . 1029
v. Walsh . . . 467
v. Williams . . . 27
Auten *v.* Ellengwood . . . 59
Autrey *v.* Frieze . . . 58, 92
Averill *v.* Loucks . . 652, 655
v. Lyman . . . 436
Avery *v.* Lauve . . . 27
Ayer *v.* Ayer 412
v. Norton . . . 392
Ayrault *v.* Chamberlain . . 392
Azel *v.* Betz 1025

Babb *v.* Reed . . . 1083
Babcock *v.* Stewart . . . 392
v. Stone . . . 329
Backus *v.* Fobes . . . 449
Bacon *v.* Cannon 66
v. Hutchings . . 266, 408
Bailey *v.* Bancker . . . 1097
v. Brownfield . . . 269
v. Clark 33
v. Kennedy . . . 1054
v. Moore 945
v. Starke 1025
Baird *v.* Baird . . 574, 1017
v. Cochran . . . 329
Baker's appeal . . . 655, 698
Baker *v.* Backus . . . 151
v. Napier 290

PAGE

Baker *v.* Stackpoole . . . 422
v. Wimpee . . . 1054
Ballard *v.* Callison . . . 1011
v. McKenna . . . 83
Baldwin *v.* Burrows . . . 27
v. Johnson . . . 412
v. Richardson . . 278, 652
v. Tynes . . . 266
Ballou *v.* Spencer . . . 56
Balliet *v.* Fink 369
Bancker *v.* Harrington . . 392
Bancroft *v.* Snodgrass . . 1045
Bankhead *v.* Alloway . 222, 291
Bank of Alexandria *v.* Mandeville 348
Bank of Chenango *v.* Osgood 433
Bank of Commerce *v.* Selden 329
Bank of Kentucky *v.* Brooking 267
v. Herndon . . 655, 682
v. Keizer . . . 1054
Bank of Louisville *v.* Hale . . 652
v. Hall . . . 689
Bank of Mobile *v.* Adams . 231
v. Andrews . . . 412
Bank of New York *v.* Vanderhorst 209, 404
Bank of Port Gibson *v.* Baugh 412, 1045
Bank of Rochester *v.* Bowen 281
v. Monteath 281, 325, 340
Bank of South Carolina *v.* Humphreys 408, 412
Bank of St. Albans *v.* Gilliland 266
Bank of Tennessee *v.* Safforans 329
Bank of the Commonwealth *v.* Mudgett 415
Bank of Vergennes *v.* Cameron 413
Bank of Wilmington *v.* Almond 433
Bank *v.* Donaldson . . . 991
v. Fowle 699
v. Gore 275
v. McDonald . . . 266
v. Sackett 266
Banks *v.* Mitchell . . . 1032
v. Wilkins . . . 1055
Barber *v.* Mann 333
v. Minturn . . . 266
v. Smith 468
Barcroft *v.* Haworth . . 97
v. Snodgrass . . 290, 1054
Bardwell *v.* Perry . . . 689
Baring *v.* Crafts . . . 339
v. Lyman . . 266, 1028
Barker *v.* White . . . 1097
v. Blake . . . 277
Barlow *v.* Coggan . . . 665
v. Reno . . . 474
v. Wiley 483
Barnard *v.* Lapeer . . . 262
Barnett *v.* Blackmar . . . 47
v. State . . . 299
Barney *v.* Currier . . . 287

	PAGE
Barrett *v.* McKenzie	690
v. Russell	266
v. Swann	47, 266
Barringer *v.* Sneed	413
Barrows *v.* Downs	383
Barry *v.* Barry	961, 1029
v. Briggs	666, 1045
Bartels *v.* Creditors	369
Bartle *v.* Coleman	189
Bartlett *v.* Jones	83
v. Powell	275
v. M'Rae	760
Bartley *v.* Williams	1025
Bart's appeal	572
Bascom *v.* Young	266
Bassett *v.* Miller	664, 666
Bass *v.* Estill	1054
v. Messeck	295
v. Taylor	413, 945
Bates *v.* Halliday	277
Bagley *v.* Smith	1025
Baxter *v.* Buchanan	1012
v. Clark	338
v. Plunkett	387
v. Rodman	20
Battaile *v.* Battaile	1026
Bayers *v.* Elliott	611
Beach *v.* Hayward	665
v. Hotchkiss	1027, 1029
v. Ollendorf	278
v. State Bank	346
v. Vandewater	93
Beacham *v.* Eckford	817, 788
Beale *v.* Poole	93
Beal *v.* Snedicor	475
Beall *v.* Lowndes	47
Beals *v.* Sea	83
Beaman *v.* Whitney	291
Bearce *v.* Washburn	21
Beardsley *v.* Tuttle	285
Beatty *v.* Ambs	369
v. Wray	775
Beauregard *v.* Case	18, 376, 505
Beaver *v.* Lewis	774
Becker *v.* Boon	412
Beckham *v.* Perry	277, 413
Beckley *v.* Munson	698
Beck *v.* Martin	244
Beckwith *v.* Manton	654
v. Talbot	18
Beebe *v.* Rogers	346
Beecham *v.* Dodd	90
Beene *v.* Cahawba, etc. R. R. Co.	100
Bemis *v.* Becker	294
Beers *v.* Reynolds	383
Behrens *v.* McKenzie	83
Biedler *v.* Shallenberger	1029
Belcher *v.* Connor	70
Belknap *v.* Cram	655
v. Wendell	18
Bell *v.* Faber	236
Bell *v.* Hall	516
v. Hare	20
v. Locke	861
v. Massey	376
v. Morrison	412
v. Newman	1054
v. Streeter	1091
Belton *v.* Fisher	665
Belt *v.* Mehan	969
Bendel *v.* Hettrick	34
Benedict *v.* Davis	47
v. Hettrick	19
Benjamin *v.* Covert	92, 406
Benners *v.* Harrison	33
Bennett *v.* Buchan.	412
v. Cadwell	867
v. Marshall	474
v. Russell	774
v. Snyder	697
v. Scott	467
v. Stickney	473
v. Woolfolk	945
Benninger *v.* Gall	945
Benson *v.* Ela	1054
v. Ketchum	20
v. Kincaid	433
v. McBee	47, 56
Bentley *v.* Smith	468
v. White	56, 383
Benton *v.* Chamberlain	406
v. Roberts	88, 267
Bentrim *v.* Zerelin	278
Berk. Wool Co. *v.* Gulliard	337
Bernard *v.* Parvin	468
v. Torrance	92, 406, 440
v. Wilcox	665
Berryhill *v.* McKeel	266, 413
Berry *v.* Cross	227
v. Jones	774
v. Kelley	661
v. McLean	867
v. Powell	505
Berthold *v.* Goldsmith	34
Best *v.* Russell	774
Beste *v.* Creditors	296
Betton *v.* Fisher	665
Bethel *v.* Franklin	1025
v. Wilson	945
Betts *v.* June	1045
Bevan *v.* Allen	1054
v. Sullivan	774
Bevans *v.* Sullivan	809
Bewley *v.* Tams	296
Biddle *v.* Moore	683
Bidwell *v.* Madison	20
Biernan *v.* Biernan	1026
v. Braches	1026
Bigelow *v.* Elliott	23, 33
Billingslea *v.* Ware	968
Billingsley *v.* Dawson	209
Billings *v.* Meigs	275

	PAGE
Binney *v.* Legal	474
v. Young	376
Binninger *v.* Clark	855
Birchett *v.* Bolling	916
Birdall *v.* Colie	1011
Bird *v.* Austin	417
v. Hamilton	817
v. Lanius	290
v. McCoy	467
v. Morrison	652
Birks *v.* French	295
Bisel *v.* Hobbs	95, 279, 338
Bishop *v.* Breckles	222
v. Georgeson	97
v. Hall	93
Bispham *v.* Patterson	413
Bissell *v.* Ames	945
v. Carville	474
v. Harrington	88
Bitzer *v.* Shunk	474
Bivingsville Manf'g Co. *v.* Bobo	474
Blackburn *v.* McCallister	278
Black's appeal	652, 1054
Black *v.* Black	652
v. Bush	655, 680, 1054
v. Struthers	665
Blackwell *v.* Rankin	1054
v. Ried	468
Blair *v.* Johnson	783
v. Snover	467
Blaisdell *v.* Pray	1031
Blakely *v.* Bennecke	57
Blake *v.* Dorgan	227
v. Nulter	652
v. Wheaton	268
Blanchard *v.* Coolidge	20
Blatchford *v.* Ross	1098
Blenn *v.* Evans	269
Blin *v.* Pierce	467, 483
Bliss *v.* Swartz	386
Bliffins *v.* Wilson	972
Block *v.* Seipt	652
Blodgett *v.* Weed	266
Bloss *v.* Chittenden	1027
Blue *v.* Leathers	19
Boardman *v.* Adams	236
v. Close	774, 817
v. Gore	266, 269, 275, 302
v. Keeler	20
Boeklin *v.* Hardenburgh	58
Bodwell *v.* Eastman	296
Boffandeck *v.* Raleigh	348
Bogereau *v.* Gueringer	376, 412
Bohler *v.* Tappan	666
Boisgerard *v.* Wall	191, 469, 820
Boise *v.* McGuire	991
Boling *v.* Anderson	287
Bonis *v.* Louvrier	883
Bond *v.* Actkin	278
v. Hays	1029
Bond *v.* Nave	95, 264, 1054
Bonnafee *v.* Fenner	92, 1028
Bonnell *v.* Chamberlain	92
Bonner *v.* Campbell	93
Bonne *v.* Kay	666
Bove *v.* Caldwell	97
Bookout *v.* Anderson	1045
Boone *v.* Smive	417
Booth *v.* Farmers' Bank	275
ads. Wonderley	115
Bopp *v.* Fox	652
Boston, etc. R. R. Co. *v.* Pearson	4
Boston, etc. Co. *v.* Smith	23, 337
Bostwick *v.* Bissell	33
Boswell *v.* Green	266
Bourne *v.* Woolbridge	277
Bowand *v.* Fraser	654
Bowen *v.* Argall	383
v. Douglass	412
v. Mead	266
v. Rutherford	92
v. Sutherlin	475
Bowie *v.* Maddox	47
Bowies *v.* Pioneer, etc., Co.	33
Bowland *v.* Boozer	1028
Bowler *v.* Huston	475, 473
Bowling *v.* Dobyns	788
Bowman *v.* Bailey	17
v. Cecil	266
v. Floyd	861
v. O'Reilly	972
Bowyer *v.* Anderson	34
v. Knapp	440
Boyce *v.* Burchard	1011
v. Brady	20
v. Coster	680, 682
v. Watson	264, 473
Boyd *v.* Brown	1026
v. Foot	961
v. McCann	410, 416
v. Mynatt	961
v. Plumb	281
Boyers *v.* Elliott	652
Bracken *v.* Kennedy	945, 1029, 1030
v. March	291
Bradbury *v.* Barnes	698
v. Smith	383
Bradford *v.* Kimberly	774, 775
Bradley *v.* Camp	406
v. Chamberlin	823
v. White	20
Bradshaw *v.* Apperson	23
Brady *v.* Calhoun	59, 88
v. Hill	413
Bragman *v.* Maguire	47
Braley *v.* Goddard	19
Brayley *v.* Goff	293, 482
Bray *v.* Farwell	1096
Brazee *v.* Poyntz	278, 451
Breckinridge *v.* Shrieve	267
Bredow *v.* Mutual Savings Institution	412

	PAGE
Brent *v.* Davis	299, 327
Brewster *v.* Hammett	691
v. Hardeman	413
v. Mott	277, 967, 968
Brickhouse *v.* Hunter	991
Bridge *v.* Gray	264
v. McCullough	1054
v. Swain	665
Brien *v.* Harriman	223
Brigham *v.* Clark	34
v. Dana	18, 777
v. Mead	100
Briggs *v.* Briggs	417
v. Vanderbilt	47
Bright *v.* Sampson	475
Brink *v.* New Amsterdam, etc. Ins. Co.	27, 265
Brinley *v.* Kupfer	972
Brisban *v.* Boyd	406
Bristol *v.* Sprague	266, 415
Broadnax *v.* Thomason	690
Broaddus *v.* Evans	295, 1054
Brockenbrough *v.* Hackley	457
Brockway *v.* Burnap	20
Bromley *v.* Elliott	33
Brooker *v.* Evans	386
v. Sullivan	266
Brooks *v.* Brooks	1054
v. Martin	569
v. McIntyre	475
v. Washington	339, 652
Brower *v.* Creditors	1060
Brower *v.* Appleby	100
Brownlee *v.* Allen	33
Brown's Appeal	775, 786, 1046
Brownson *v.* Metcalfe	468
Brown *v.* Agnew	760
v. Birdsall	483
v. Broach	408
v. Clarke	406
v. Crandall	92
v. Davis	441
v. Fitch	340
v. Haven	467
v. Haynes	329, 837
v. Higginbotham	33, 221
v. Jacquette	19
v. Jewett	85
v. Lang	1054
v. Lawrence	277
v. O'Brien	572
v. Marsh	493
v. McFarland	775
v. Robbins	18
v. Shackleford	791
Bruches *v.* Anderson	291
Bruen *v.* Marquand	278
Brundred *v.* Muzzey	15
Brush *v.* Maudwell	1025
Bryant *v.* Hawkins	417
Bryant *v.* Hunter	652
Bryan *v.* Tooke	266
Bryden *v.* Taylor	92
Bryer *v.* Weston	92
Bry *v.* Cook	991
Buchanan *v.* Chesseborough	222
v. Comstock	1015
v. Curry	265
Buchan *v.* Sumner	652, 1054
Buchner *v.* Ries	1027
Buchos *v.* Grandjear	265
Buckingham *v.* Burgess	47, 506
v. Hanna	239
v. Ludlam	788
Buckley *v.* Buckley	652
v. Carlisle	1025
v. Lord	383
Bucklin *v.* Bucklin	436
Buckmaster *v.* Gowan	1026
Bucknam *v.* Barnum	33
Buckner *v.* Lee	33, 348
v. Rees	92
Buck *v.* Dowley	18
v. Mosley	277
v. Smith	915
v. Winn	1054
Buell *v.* Cole	1028, 1029
Buffalo City Bank *v.* Howard	406
Buffum *v.* Buffum	92, 652
v. Seaver	1055
Buford *v.* Neely	774, 947
Bulkley *v.* Marks	383
Bullfinch *v.* Wenchenbach	18, 689
Bullard *v.* Kinney	1085
Bullitt *v.* M. E. Church	654
Bullock *v.* Ashley	973
v. Hubbard	1055
Bull *v.* Harris	266
v. Schubert	20
Bumpus *v.* Webb	1029
Burbank *v.* Haas	47
Burchard *v.* Boyce	878, 954
Burckle *v.* Eckhart	20
Burdick *v.* Washburn	19
Burditt *v.* Grew	1028
Burgen *v.* Droniel	482
Burgess *v.* Lane	98
v. Merrill	483
Burgwin *v.* Hastler	665
Burke *v.* Smith	105
Burleigh *v.* Parton	262 329
v. White	774
Burley *v.* Harris	469, 1029
Burlington, etc., R. R. Co. *v.* Boestler	105
v. Dick	468
Burnell *v.* Weld	516
Burnett *v.* Snyder	33, 54, 457
v. Wash	482
Burney *v.* Boone	1028

	PAGE
Burnham *v.* Hopkinson	1029
v. Whittier	268
Burnley *v.* Rice	267, 338
Burnside *v.* Savier	665
Burns *v.* Hall	468
Burns *v.* McKenzie	413
v. Nottingham	1027, 1029
v. Rowland	47
Burpee *v.* Bunn	1054
Burrall *v.* Acker	690
Burress *v.* Blair	698
Burr *v.* Wilcox	100
v. Williams	412
Benton *v.* Ferris	339
v. Goodspeed	20
Burtus *v.* Tisdall	655
Burwell *v.* Mandeville	231
v. Springfield	277
Busby *v.* Chenault	1054
Busfield *v.* Wheeler	654
Bush *v.* Clark	667
v. Guion	809
Butler *v.* American Toy Co.	86
v. Barleson	857
v. Finck	20, 90, 236
v. Lemley	774
v. Stocking	281
Button *v.* Hampson	278
Butterfield *v.* Hensley	278
v. Beardsley	1083, 1097
Byington *v.* Gaff	279
Byrd *v.* Fox	1018, 1025
v. Mynatt	820
Byrne *v.* Schwing	467
CABANISS *v.* Clark	682
Cadwallader *v.* Krœsen	277
Cady *v.* Shepherd	413
Cahoon *v.* Hobart	406
Caldwell *v.* Leiber	651, 774
v. Palmer	652, 689
v. Scott	295, 1054
v. Stileman	1053
Calkins *v.* Smith	329
Calk *v.* Orear	451
Callender *v.* Sweat	93
Calloway *v.* Tate	958
Calvin *v.* Markham	469
Calvitt *v.* Markham	1031
Camblat *v.* Tupery	991
Cameron *v.* Blackman	290
v. Francisco	774, 775
v. Watson	807, 991
Cammack *v.* Johnson	1054
Campbell *v.* Bowen	290, 598
v. Campbell	652
v. Dent	19
v. Hastings	52, 92, 93
v. Hooper	83
Campbell *v.* Lacock	867
v. Mathews	421
v. Stewart	783
v. Whitley	93
Campston *v.* McNair	56
Camp *v.* Page	277
Candless *v.* Hadden	665
Canfield *v.* Hard	958
Cannon *v.* Copeland	878
v. Weldman	277
Canster *v.* Burke	1030
Capen *v.* Barrows	1026
Capelle *v.* Hall	236
Cape Sable Co.'s Case	224
Carilton v. Thomas	689, 690
Carithers *v.* Jarrell	680
Carlin *v.* Donegan	784, 945, 972
Carlisle *v.* Mulhern	652
v. Tenbrook.	782
Carlton *v.* Cummings	266
v. Ludlow, etc. Mills	92, 93
Carmichael *v.* Grier	52
v. Greer	415
Carper *v.* Hawkins	412, 972
Carrier *v.* Cameron	266
Carroll *v.* Alston	231
v. Evans	230
v. Gayarre	457
Carter *v.* Adamson	867
v. Beaman	277
v. Bradley	661
v. Currie	485
v. Christie	1028
v. Douglass	92
v. Pomeroy	262
Carthaus *v.* Ferris	265
Cary *v.* Williams	1025
Casco Bank *v.* Hills	410
Case *v.* Beauregard	311, 655
v. Cushman	867
v. Maxy	1028
Cash *v.* Earnshaw	227
v. Tozer	474
Cassidy *v.* Metcalf	857
Castley *v.* Towles	945
Castle *v.* Bullard	299
v. Reynolds	1045
Caswell *v.* Cooper	1025
v. Howard	698
Catskill Bank *v.* Gray	33
v. Messenger	433
Catlin *v.* Gilders	236
Catron *v* Shepherd	574
v. State	266
Cavitt *v.* James	1045
Cayton *v.* Hardy	236
v. Walker	967
Central, etc., Institution *v.* Walker	4
Central, etc., Bank *v.* Walker	47
Chadsey *v.* Harrison	1029

	PAGE
Chaffee *v.* Rentfroe	95
Chaffin *v.* Chaffin	442
Chaffraix *v.* Price	20
v. Lafitte	32
Chalfont *v.* Grant	689
Chamberlain *v.* Bancroft	412
v. Chamberlain	574, 652
v. Dow	406
v. Madden	451
v. Prior	314
v. Walker	1026
Chambersburg, etc., Co. *v.* Hazelet	338
Chambers *v.* Clearwater	299
v. Crook	973
Champeon *v.* Bostwick	47
Champlin *v.* Tilley	95
Chance *v.* Chambers	468
Chandler *v.* Allen	778
v. Brainard	18
v. Herrick	433
v. Sherman	236, 973
Channel *v.* Fassett	697
Chapin *v.* Clemetson	643
Chapline *v.* Conant	34
Chapman *v.* Devereux	2, 339
v. Walson	27
v. Wilson	97
Chardon *v.* Oliphant	413
Charman *v.* Henshaw	97
v. McLane	278
Chase *v.* Barrett	18, 20
v. Deming	482
v. Garvin	1027, 1029
v. Kendall	412
v. Merrimack Bank	129
v. Scott	661
v. Steel	1054
v. Stevens	60
v. Sycamore, etc., R. R. Co.	105
v. Vaughan	436
Chazournes *v.* Edwards	266
Cheeseman *v.* Sturges	652
v. Wiggins	945
Cheever *v.* Lamar	991
Chemung Bank *v.* Bradner	406
v. Ingraham	342
Chenowith *v.* Chamberlin	266
Chester *v.* Dickinson	88, 302, 314
Chidsey *v.* Porter	97
Childs *v.* Hyde	665
v. Wofford	338
Chipley *v.* Keaton	295
Chisholm *v.* Cowles	58
Choppin *v.* Wilson	691
Christian *v.* Crocker	20
v. Elliott	278
v. Ellis	1054
Christy *v.* Sherman	474
Church *v.* Sparrow	269
Church *v.* First Nat'l Bank	275
Cilley *v.* Huse	652
City Bank of Brooklyn *v.* Dearborn	415
City Nat'l Cank *v.* Phelps	406
City of Maquota *v.* Willey	654
Claygett *v.* Kilburne	99, 689
v. Salmon	433
Clancy *v* Craine	83
Clapp *v.* Rogers	415
v. Upson	456
v. Watson	788
Clark's Appeal	652
Clarkson *v.* Carter	467
v. E. & N. S. Dispatch	1091
Clark *v.* Billings	436
v. Clark	1035
v. Dearborn	266
v. Dibble	1027
v. Gilbert	20
v. Gridley	973
v. Hogeman	266
v. Holmes	339, 482
v. Houghton	284
v. Howe	665
v. Jones	977
v. Lyman	689
v. McClelland	266
v. Miller	467
v. Reed	18
v. Rives	266
v. Stoddard	475, 482
v. Wilson	166
Clay *v.* Cottrell	329
Clean *v.* Miller	655
Cleghorn *v.* Johnson	95
v. Ins. Bank	1054
Cleveland *v.* Woodward	467, 483
Clement *v.* Hadlock	19
Clements *v.* Mitchell	92, 777, 991
v. Brush	278
v. Foster	655
Cline *v.* Wilson	666, 667
Clough *v.* Hoffman	867
Cobble *v.* Tomlinson	665
Cobb *v.* Abbott	47
v. Illinois Central R. R. Co.	341
Cochran *v.* Albert	230
v. Cunningham	467
v. Perry	92, 230
Cocke *v.* Branch Bank	266
Cockroft *v.* Claflin	281
Coder *v.* Huling	574
Coddington *v.* Hart	406
v. Idell	572, 774
v. Tappan	1011
Cody *v.* Cody	230
v. Shepherd	278
Coffing *v.* Taylor	698
Coffin *v.* Jenkins	20
v. McCullough	683

PAGE
Cohen v. N. Y. Life Ins. Co. . . . 78
Coldwell v. Sethens . . . 348
Colegrove v. Tallman . . . 419
Coleman v. Coleman . . . 1029
v. Lansing . . . 867
v. Marble 903
v. O'Neil . . . 314, 436
Coles v. Coles 652
Colville v. Gilman . . . 1029
Cole v. Moxley 222
v. Pennell 483
v. Reynolds 967
Colgin v. Cummins . . . 788
Collamer v. Foster . . . 1029
Collier v. Cross . . . 98, 266
v. Leech 440
Collins v. Butler . . . 643, 1054
v. Decker 652
v. Hood 1054
v Owens 973
Collomb v. Caldwell . . . 1054
Collumb v. Read 652
Collyer v. Collyer . . . 945
v. Moulton 449
Colt v. Wilder . . . 337, 392
Colton v. Evans. . . . 329
Combs v. Boswell . . . 277
Commercial Bank v. Corbitt . . 652
v. Lewis . . . 268, 683
v. Warren . . . 262
Commonwealth v. Bennett . . 20
Comstock v. Buchanan . . 572
v. White 841
Conant v. Frary . . . 698, 1054
Conery v. Hayes 413
v. Rotchford 474
Conkling v. Ogborn . . . 412
v. Washington University 18, 1054
Conklin v. Barton . . . 34, 93
Conley v. Good 482
Conn. etc. R. R. Co. v. Bailey . 100
Connor v. Allen 1045
Conroy v. Campbell 611
v. Woods 655
Consolidated Bank v. Stale . . 22
Converse v. McKee . . . 1054
v. Shambaugh 95
Conwell v. Sandidge . . 392, 680
Cony v. Wheelock . . . 412
Cooke v. Allison 269
Cookingham v. Lasher 339, 467, 482
Cook v. Arthur 689
v. Beech . . . 468
v. Bloodgood . . 277
v. Carpenter . . . 27, 47
v. Carson 1045
v. Castner 294
v. Jenkins 760
v. Lewis 1045
PAGE
Cook v. Rogers . . 231, 1064
v. Watson 652
Cooley v. Broad 33
v. Sears 482
Coons v. Rennick 236
Cooper's Appeal . . 683, 689, 1055
Cooper v. Bowles . . . 266
v. Burns 53
v. Frederick . . 968, 973
v. Frierson 291
v. Lawhead 47
v. McClurkan . . . 329
v. Merrihew 775
v. Reid 775
Coover's Appeal . . . 1055
Copcutt v. Merchant . . . 1053
Cope's Appeal 1055
v. Fultz 665
Copp v. Lacy 383
Corbin v. McChesney . . . 277
Corning v. Greene . . . 1094
Cornwall v. Cornwall . . . 652
v. Sandidge . . . 680
Corwin v. Suydam. . . 266, 295
Cory v. Long 683
Coster v. Clark . . . 1054
v. Bank of Georgia . . 652
Costley v. Wilkerson . . . 667
Cottle v. Leitch 228
Cottrell v. Vanduzen . . . 47
Condry v. Gillian . . . 964
Coursen's Appeal 572
Coursen v. Hamlin . . . 774
Course v. Prince . . . 1029
Coursey v. Baker 266
Cowand v. Pulley . . . 47
Cowan v. Iowa State Ins. Co. . 662
v. Kinney . . 95, 264
Cowles v. Garrett . . . 58
Cox v. Bodfish . . . 99, 1097
v. Delano 33
v. Harris 468
v. McBurney . . . 652
v. Peters 1011
v. Russell . . 1029, 1055
Cragin v. Carleton . . . 98
Craig v. Alverson . 33, 47, 264
v. Warren . . . 47
v. Henderson . . 506
v. Hulschiger . . 277
Cramer v. Backman . . 774, 775
Cram v. Cadwell 293
v. Union Bank . . . 698
Crandell v. Denney . . . 468
Crane v. Barry 965
v. French 474
Crary v. Williams . . . 27
Crater v. Bunninger . 1026, 1096
Crawford v. Austin . . . 20
v. Baum 1055

PAGE

Crawford *v.* Collins 208
Creel *v.* Bell 467
Cregler *v.* Durham . . . 222, 408
Cresswell *v.* Blank 1053
Crocker *v.* Colwell 348
Crockett *v.* Crain 1054
Crooker *v.* Crooker . 440, 680, 1054
Croone *v.* Bivens 683
Cropper *v.* Coburn 689
Crosby *v.* McDermott . . . 1025
v. Nichols . . 276, 654
Crosthwait *v.* Ross . . . 267
Cross *v.* Burlington Nat. Bk. . 392
v. Jackson 1083
v. Langly 95
Crosswell *v.* Lehmann 297
Crottes *v.* Frigerio 1030
Crouch *v.* Bowman . . . 344
Crowell *v.* Western, etc., Bank . 97
Crowley *v.* Bank of Kentucky . 406
Crow *v.* Weidner . . . 1045
Croughton *v.* Forrest . . . 572
Crozier *v.* Kirker . . . 47, 348
Crumless *v.* Sturgess . . . 264
Crum *v.* Abbott 392
Crutwell *v.* De Russell 278
Crille *v.* Glassen 80
Culbertson *v.* Townsend . 665, 666
Cullom *v.* Bloodgood . . . 266
Cummings *v.* Mills 19
Cummins *v.* Cassily 278
Cumpston *v.* McNairl 18
Cunliff *v.* Dyerville 774
Cunningham *v.* Bragg 412
v. Ihmson 1028
v. Smith 991
v. Smithson 346
v. Sublette 264
Currier v. Hale 1028
v. Rowe 1026
v. Silloway . . . 95
v. Webster 1026
Curtiss *v.* Hoyt 745
Curtis *v.* Belknap 467
Curry *v.* Fowler 23
v. Warrington 369
v. White 408
Curyea *v.* Beveridge 972
Cushing *v.* Marston 467
v. Smith 341
Cushman *v.* Bailey 33
Cutts *v.* Gordon 483
Cutler *v.* Thomas 1084
v. Winsor 34
Cuviz *v.* Burnet 1029

Dailey *v.* Coons 47
Dakin *v.* Graves . . . 760, 1027
Dale *v.* Pierce 34
Dalton City Co. *v.* Dalton Mfg. Co. 19
v. Hawes 33

PAGE

Daly *v.* Ericson 665
Dana *v.* Conant 329
v. Lull 266
Dane *v.* Young 136
Daniel *v.* Daniel 281
v. Nelson 413
v. Toney 278
v. Townsend 1054
Davenport *v.* Gear 1029
v. Runlett 329
David *v.* Keyes 416
Davidson *v.* Kelley 451
v. Weems 665
Davis *v.* Allen 408
v. Black 236
v. Blackwell 236
v. Briggs . 412, 1028, 1030
v. Carroll 689
v. Christian . . . 231, 652
v. Church 665
v. Cook . . . 88, 236, 266
v. Dodge 277
v. Evans 26
v. Grove 1054
v. Hubbard 463
v. Lane 224
v. Richardson . . . 236, 269
v. White 97
Davis' Estate *v.* Desauque . . . 440
Darling *v.* Boston, etc., Ry. Co. . 47
v. March . . . 266, 412
Darrow *v.* Bruff 383
Dart *v.* Walker 1027
Dayton *v.* Wilkes . . . 855, 947
Day *v.* Lafferty 278
v. Lockwood . . . 783, 786
v. Perkins 652
Dayton, etc. R. R. Co. *v.* Hatch . 129
v. Wetherby 442
Deal *v.* Bogue 690
Dean *v* McFaul 417
v. Phillips 1054
v. Savage 482
Deckard's case . . . 266, 295
Deckert *v.* Filbert 412
Decker *v.* Howell 18
Deere *v.* Plant 392
Deering *v.* Flanders 415
v. Metcalf 698
Deford *v.* Reynolds 405
Degan *v.* Singer 264
DeGrieff *v.* Wilson 485
DeGrott *v.* Darby 468
Dehority *v.* Nelson 1029
DeJamette *v.* McQueen . . . 1029
Delamour *v.* Roger . . . 676
Delaney *v.* Dutcher 97
DeLeon *v.* Trevino . . . 198
DeLezarde *v.* Gossett 383
Delmonico *v.* Giullaume . . . 652
Deming *v.* Colt . . . 266, 652

	PAGE
Demoss *v.* Brewster	475
Demott *v.* Swain	475
Denis *v.* Saunders	84
Denman *v.* Dosson	415
Dennis *v.* Kennedy	1083, 1084, 1089, 1092
v. Ray	655
Denny *v.* Cabot	17, 19
Dewey *v.* Metcalf	470
Densmore Oil Co. *v.* Densmore	581
Denton *v.* Erwin	968
Dent *v.* Slough	311, 945
Denver *v.* Roane	775, 776, 945
Derby *v.* Gage	1015
v. Gallupp	295
Desha *v.* Holland	467
v. Smith	786
Deshon *v.* Schorr	290
Deval *v.* McIntosh	867
Deveau *v.* Fowler	1011
Devenney *v.* Mahoney	652
Devine *v.* Mitchum	652
Devin *v.* Harris	333
Devoss *v.* Gray	57
Dewey *v.* Dewey	652
Dewitt *v.* Chandler	1093
Dewit *v.* Stamford	1029
Dexter *v.* Arnold	788
DeZeng *v.* Bailey	433
Diall *v.* Neuffer	84
Dickson *v.* Alexander	291
v. Ind. C. M. Co.	417
Dickinson *v.* Bold	823
v. Dickinson	405, 406, 415, 1015
v. Granger	1027
v. Legare	266, 278
Dillard *v.* Scruggs	20
Dillon *v.* Brown	278
Dilworth *v.* Mayfield	652, 878
Dimond *v.* Hazard	654,
v. Henderson	788, 789, 809
Dixon *v.* Barclay	264
v. Hood	92
Dix *v.* Otis	93, 392
Ditts *v.* Lonsdale	266
Doak *v.* Swan	58
Doane *v.* Adams	791
Dobson *v.* Chambers	93
Dob *v.* Halsey	21, 467
Dodd *v.* Bishop	47, 451, 408
v. Dreyfus	448
Dodge *v.* McKay	278
Doe *v.* Tupper	278
Doggett *v.* Jordan	90
Dole *v.* Thomas	1027
Donaldson *v.* Bank of Cape Fear	652
v. Kendall	278
Donelson *v.* Posey	680
Doniphan *v.* Gill	278, 337
Donley *v.* Hall	19
Donnelly *v.* Ryan	269
Donnee *v.* Parsons	269
Donnell *v.* Harshe	19
Doty *v.* Bates	341
Doremus *v.* McCormick	264, 277, 302
Doris *v.* French	581
Dorsey *v.* Dashiel	867
Dortie *v.* Duzas	264, 924
Dougal *v.* Cowles	346
Dougelot *v.* Rawlings	264
Dougherty *v.* Van Nostrand	774, 860, 1016
Doughty *v.* Doughty	225
Douglas' Case	232
Douglas *v.* Winslow	661
Dowdall *v.* Lenox	269
Downing *v.* Linville	277
Downs *v.* Jackson	760
Dowry *v.* Roberts	412
Dow *v.* Phillips	266
Doyle *v.* Bailey	945
Drake *v.* Blomet	1053
v. Elwyn	90
v. Ramsey	19
v. Taylor	369
Draper *v.* Moore	236
v. Bissell	412
Drennan *v.* House	93, 95
Drew *v.* Ferson	774
Drewry *v.* Montgomery	652
Dreyer *v.* Sander	266
Drumwight *v.* Philpot	278
Dudley *v.* Littlefield	88, 291
Duffield *v.* Brainard	231
Dumont *v.* Ruepprecht	222, 227, 774
Dunbar *v.* Bullard	88
Duncan *v.* Clark	266
v. Lewis	392
v. Tombeckbee Bank	475
Dundass *v.* Gallagher	267, 415, 1045
Dunham *v.* Gillis	1025
v. Hanna	1054
v. Jarvis	1013
v. Murdock	1055
v. Rodgers	20
Dunklin v. Kimball	266
Dunlap *v.* Lenies	412
v. Richards	572
v. Watson	774, 775, 788
Dunnell *v.* Henderson	837, 991
Dunning's appeal	383
Dunton *v.* Brown	80
Durant *v.* Abendroth	383
v. Rogers	299, 278, 302
Durbin *v.* Barber	972, 980
Durham *v.* Hartlett	867
Duryea *v.* Burt	18, 680
v. Whitcomb	18
Dupont *v.* McLaren	230

PAGE

Dupre *v.* Body 376
Dupuy *v.* Leavenworth 652
Durand *v.* Curtis 392
Dutchess Mfg. Co. *v.* Davis . . 100
Dwight *v.* Brewster 47
v. Simon 216
Dwinel *v.* Stone . . 20, 90, 1045
Dyas *v.* Dinkgrave 467
Dyer *v.* Drews 376
v. Sutherland 278

EAGER *v.* Crawford 23
v. Price 295
Eakin *v.* Fenton 698
v. Schumacher . . . 575
Earbie *v.* Evans 482
Early *v.* Duborrow 807
v. Reed 281
Earl *v.* Hurd 92
Eason *v.* Cherry 572
Easter *v.* Farmers' Nat. Bank . 408
Eastman *v.* Clark 34
v. Wright 469
Eaton's Appeal 972
Eaton *v.* Taylor 412
Ebbert's appeal 652
Ebbinghouse *v.* Worth Club . 1093
Edrus *v.* Williams 230
Edgar *v.* Cook 1060
v. Donnelly 652
Edgerly *v.* Gardner 47
Edwards *v.* McFall 405
v. Pitzer 474
v. Tracy 19
Egberts *v.* Woods . . 266, 413, 832
Egery *v.* Howard 1054
Eichelbaum *v.* Irons 57
Elancy *v.* French 467
Elderkin *v.* Winne 18
Elder's Appeal 1029
Elder *v.* Hood 1026
Eldridge *v.* Troost 18
Ellicott *v.* Nichols 412
Elliott *v.* Dudley 329
v. Ince 83
v. Stevens 648
Elkin *v.* Green 269
Ellison *v.* Chapman 1026
Ellis *v.* Bronson 406, 410
v. Commander . . . 1011
v. Jameson 98
Ellsworth *v.* Pomeroy . . . 19
v. Tartt 47
Ely *v.* Hair 278
Emanuel *v.* Bird 1053
v. Draughn 18
Emerson *v.* Harmon 266
v. Parsons 222
Emmons *v.* Westfield 23
England *v.* Burt 95

PAGE

England *v.* England 20
Englis *v.* Furniss . . . 470, 1031
Ennis *v.* Williams 415
Enix *v.* Hays 506
Ensign *v.* Briggs 652
v. Woods 383
Ensminger *v.* Marvin 266
Eps *v.* Dillaye 415
Erwin's appeal 652
Eskins *v.* Knox 760
Estabrook *v.* Messersmith . 295, 302
v. Smith 468
Estate of Davis *v.* Desauque . . 440
Este *v.* Whipple 1029
Etheridge *v.* Binney 383
Evans *v.* Clapp 760
v. Corey 433
v. Corriell 264
v. Gibson 574
v. Hanson 611
v. Hawley . . . 654, 655
v. Evans 1011
v. Montgomery . . . 991
Everett *v.* Chapman . 33, 90, 333, 338
v. Coe 17, 23, 33
Everet *v.* Strong 266
Everingham *v.* Ensworth . . 277
Everitt *v.* Watts 961
Everson *v.* Gehrman 474
Ewing *v.* Meddock 1085
Ex parte Shepherd 680
Ex parte Ware 665

FABER *v.* Levi 878
Fagan *v.* Long 392
Fagely *v.* Bellas . . . 337, 488
Fagg *v.* Hambel 433
Fail *v.* McKee 17
Fairbank *v.* Leary . . . 819, 855
Fairchild *v.* Fairchild . . 652
v. Valentine 948
Fales *v.* Jordan 1055
Fall River, etc., Bank *v.* Sturtevant 329
Fall River Co. *v.* Borden . 88, 652
Falkner *v.* Hunt 945
Fanning *v.* Chadwick . . 572, 1027
Fanshaide *v.* Lane 383
Fant *v.* West 267
Farman *v.* Brooks 570
Farmers' Bank *v.* Baliss . . 348
Farmers', etc., Bank *v.* Green . 406
Farmers', etc., Co. *v.* Ross . . 33
Farmer *v.* Samuel 574
Farrer *v.* Farrer 774
v. Haseldon 666
v. Shepherd 963
Farr *v.* Johnson 676
v. Wheeler 93
Farwell *v.* Davis 483
v. Tyler 1029

	PAGE
Faulds *v.* Yates	652
Faulkner *v.* Whitaker	468
Faust *v.* Burgevin	867
Faver *v.* Briggs	475
Fawcett *v.* Osborne	19
Feick *v.* Barbonn	92
Feigley *v.* Sponeberger	290
Felbritch *v.* Armstrong	415
Felder *v.* Wald	972
Felichy *v*, Hamilton	47, 50
Fellows *v.* Greanleaf	698
v. Wyman	412
Felton *v.* Reid	665
Fenn *v.* Bolles	861
Timson	95
Ferguson *v.* Alcorn	19
v. Gordon	236
v. Hass	652
v. King	467
v. White	967
Ferrerro *v.* Buhlmeyer	222
Ferris *v.* Thaw	57
Ferry *v.* Berry	652
Ferson *v.* Moore	655
Fessler *v.* Hickernell	973
Fielden *v.* Lahens	329
Field *v.* Chapman	655
v. Tenney	92
Filbert *v.* Bickel	262
Filley *v.* Phelps 231,277, 661, 666,	1054
Fillyall *v.* Laverty	1053
Findlay *v.* Stevenson	290
Finlay *v.* Fay	698
v. Stewart	1027
Finney *v.* Allen	482
v. Turner	1029
First Nat'l Bank *v.* Breese 262,	266
v. Carpenter	281
v. Morgan 231,	665
v. Whitney	383
Fisher *v* Bowles	47
v. Murray	266
v. Pender	278
Fish *v.* Herrick 1054,	1055
Fisk *v.* Copeland	264
Fitchburn *v.* Boyer	278
Fitch *v.* Hall	19
v. Harrington 33,	95
v. Stamp	287
Fitzgerald *v.* Christt	658
Fitzhugh *v.* Wilcox	83
Flagg *v.* Stowe 4, 676, 682,	973
Flannagan *v.* Alexander	295
Flannery *v.* Anderson	475
Fleming *v.* Billings	1054
v. Dunbar	278
v. Lawhorn	278
Floyd *v.* Miller.	408
v. Wallace	339
Flynn *v.* Fish	698
Fogerty *v.* Jordan	96

	PAGE
Fogg *v.* Greene	95
v. Johnston	222
v. Lawry	689
Foltz *v.* Powrie	412
Folk *v.* Russell	456
v. Wilson	93
Fontanie *v.* Lee	408
Foot *v.* Taber	281
Forbes *v.* Davison	93
v. Scannell	266
v. Webster	760
Forde *v.* Herron 683,	684
Ford *v.* McBride	676
v. Smith	34
Forkner *v.* Stewart	278
Forrester *v.* Oliver 231,	666
Forrey *v.* Baxter	412
Fort Miller, etc., R. R. Co. *v.* Payne	105
Fortune *v.* Brazier	468
Foster's appeal	652
v. Andrews	329
v. Barnes	652
v. Fifield	264
v. Goddard	837
v. Hall 348, 220,	1054
v. Kison	967
Foulks *v.* Rhodes 1028,	1029
Fountaine *v.* Urquhart	946
Fourth Nat'l Bank *v.* Carrolton 698,	878
Fowlber *v.* Bullock	1025
Fowler *v.* Bailley	652
Fowle *v.* Harrington	665
Fox *v.* Norton	278
v. Narramore	1093
Frances *v.* Smith	392
Francis *v.* Lavine	878
Franklin *v.* Robinson	774
Frank *v.* Peters	682
Freck *v.* Blackiston	573
Frederick *v.* Cooper 701,	1030
Freeman *v.* Bloomfield	697
v. Falconer	410
v. Ross	266
v. Stewart	1053
Freese *v.* Ideson	18
Freligh *v.* Miller	697
French *v.* Chase	1054
v. Lovejoy 295,	1054
v. Rowe	294
Frentress *v.* Markle	436
Frith *v.* Lawrence	680
Fromane *v.* Jones	266
Fronebarger *v.* Henry	278
Frost *v.* Shackleford	485
v. Walker 92,	131
Frothingham *v.* Barney	1099
Fry *v.* Potter	1029
Flyn *v.* Fish	698
Fuller *v.* Benjamin	878
v. Miller	774
v. Percival	329

	PAGE
Fuller *v.* Rowe	92
Fulton *v.* Williams	450
Funk *v.* Leacham	948
Furber *v.* Carter	47
Gaar *v.* Huggins	415
Gadsden *v.* Carson	1054
Gage *v.* Parmalee	788, 809
Gaines *v.* Catron	652
v. Coney	973
Gaither *v.* Caldwell	485
Galbraith *v.* Gedge	652
Gale *v.* Miller	275, 408
Galliott *v.* Planters' Bank	412, 415
Gallott *v.* McClusky	467
Galloway *v.* Hughes	275, 822
Gallupp *v.* Newman	23
Galway *v.* Fullerton	698
Galt *v.* Calland	337
Gannett *v.* Cunningham	412
Gansevoort *v.* Williams	329
Ganson *v.* Lathrop	1054
Gardiner *v.* Battaille	222
Gardner *v.* Baker	433
v. Conn	440
v. N. W. M'f'g Co.	264
Garland *v.* Agee	412
Garnier *v.* Gerard	698
v. Paul	690
Garvin *v.* Weaver	1006
Gates *v.* Bennett	284
v. Hughes	213
v. Bullock	278
Geddes' Appeal	924
Geery *v.* Cockroft	295
Geheeber *v.* Stanby	482
Genese *v.* Cooper	857
Geortner *v.* Trustees	1011
George *v.* Grant	383
Gerard *v.* Basse	278
v. Gateau	227, 229
Getchell *v.* Foster	47, 275
Gibson *v.* Moore	1028
v. Ohio Farina Co.	1032
v. Stevens	84, 690
v. Stone	23
Gibbs *v.* Bates	269
Giddings *v.* Palmer	683
Gibson v. Warden	278
Gilbank *v.* Stevenson	19
Gilbert *v.* Whidden	92
Gildersleeve *v.* Mahony	266
Gilhooley *v.* Hart	774, 786
Gillett *v.* Hall	945
Gillisse *v.* Gibson	654
Gillaspy *v.* Peck	1054
Gill *v.* Kuhn	17
Gilman v. Cosgrove	468
v. Vaughan	788
Gilmore *v.* Merrill	23
Gilmore *v.* N. A. Land. Co.	689, 690
Gilpin *v.* Temple	90, 93
Given *v.* Albert	338
Glasscock *v.* Smith	1045
Gleason *v.* Clark	413
v. White	1030
Glenn *v.* Gill	47, 1054
v. Hibb	945
Glover *v.* Tuck	1025
Glynn *v.* Phetteplace	682
Goddard *v.* Pratt	410
v. Renner	652
Goell *v.* Morse	58
Goldsborough *v.* McWilliams	1029
Gomersall *v.* Gomersall	1029
Good *v.* McCartney	20
Goodburn *v.* Stevens	231, 644, 1046
Goodenough *v.* Duffield	264
Goodenow *v.* Jones	387, 392
Goode *v.* Linecum	383
v. McCartney	277
Gooden *v.* Morrow	417
Goodman *v.* White	296
Goodnow *v.* Smith	433
Goodwin *v.* Ernstein	569
v. Richardson	652, 1054, 1055
Gordon *v.* Bankard	95
v. Buchanan	244
v. Freeman	275
v. Janney	468
v. Joslin	441
v. Kennedy	652
Gorman *v.* Russell	227, 745
Gott *v.* Dinsmore	1092
Gould *v.* Gould	467
Gover *v.* Hall	222
Gowan *v.* Jeffries	224, 1011, 1012
Grady *v.* Robinson	278, 406
Graeff *v.* Hitchman	348
Graff *v.* Pittsburg, etc. R. R. Co.	129
Grafton Bank *v.* Moore	92, 95
Graham *v.* Harris	469
v. Meger	299
Gram *v.* Seaton	278
Granger *v.* McGilvra	412
Grant *v.* Bryant	790, 1014
Graser *v.* Stellwagen	295
Gruswett *v.* Connolly	655
Gratz *v.* Bayard	231
Graves *v.* Hall	266
v. Kellenberger	267
v. Merry	412, 415
Gray *v.* Brown	433
v. Cropper	314
v. Gibson	18, 383
v. Larrimore	878
v. Palmer	55, 88, 339, 665
v. Portland Bank	572
v. Ward	266
Greeley *v.* Wyeth	277

PAGE
Green v. Caulk 97
v. Chapman 469
Greene v. Breck 515
v. Ferrie 792
Greenleaf v. Quincy 457
Greenville, etc. R. R. Co. v. Coleman 129
Green v. Pyne 482
v. Ross 689
Greenwall v. Kaster 433
Greenwood v. Brodhead . . . 655
Greggs v. Fisher 269
Gregg Township v. Half moon Township 21
Gregg v. Brower 968
v. Fisher 266
v. James 275
Gregory v. Dodge 18
v. Harmon 475
v. Martin 95
Gribbin v. Thompson . . . 482
Gridley v. Conner 412, 788, 878, 1014
v. Dole 1026, 1029, 1030, 1096
Grieff v. Boudousquie . . . 47
v. Kirk 475
Grier v. Hood 474
Griffey v. Northcutt 652
Griffin v. Doe 92
v. Orman 867
v. Samuel 369
Griffith v. Buck 683, 867
v. Buffum . . . 19, 338
v. Chew 469
v. Hill 1030
Griggs v. Clarke . . 676, 972, 1046
Grigsby v. Nance 1026
Grinman v. Baton Rouge Co. 415
Griswold v. Haven 294
v. Paine 227
v. Waddington 79, 223, 224, 232
Grobb's Appeal 652
Grooves v. Tollman 26
Groesbeck v. Brown . . . 473
Grosvenor v. Austin 1054
Groves v. Miles 783
Grove v. Fresh 972
Grozebook v. McCreedie . . 473
Grund v. Van Fleck 297
Grubb v. Cottrell 760
Guild v. Leonard 655
Guilbeau v. Melancon . . . 652
Guillon v. Peterson . . . 311, 383
Gulick v. Gulick . 264, 442, 1027
Gunnell v. Bird 973
Gunter v. Jarvis 665
Gumbel v. Abrums 47
Gurler v. Wood 297
Guyton v. Flack . . 655, 1013
Guzzan v. Bebee 482
Gwinn v. Rooker 278
Gwin v. Shelby 655
Gyger's Appeal 788

PAGE
Haas v. Root 33
Habicht v. Pemberton . . . 1091
Hacker v. Johnson . . . 690
Hackley v. Hastie 413
Haddock v. Crocheron . . . 408
Hagan v. Stone 467
Hagendobler v. Lyon 412, 468, 492
Hagar v. Mounts . . . 266
v. Stone . . . 467, 483
Haggerty v. Foster . . . 383
v. Granger 266
Hager v. Cleveland . . . 129
Haile v. York 27
Haines v. Hollister . . . 878
Haldeman v. Bank of Middletown 266, 269
Halderman v. Halderman . . 1030
Hale v. Brennan 92
v. Henric 652
v. Van Saum . . . 475
v. Wilson 1027
v. Watts 652
Hallack v. Marsh 265
Hallett v. Desbau . . . 34
Haller v. Williamowic . 783, 1026
Hahn v. St. Clair Savings Co. . 264
Halliday v. McDougall . . 92, 369
Halloway v. Brinkley . . . 19
Hall v. Clagett 412, 661, 809, 902, 963
v. Edson 20
v. Jones . . 440, 442, 435
v. Lanning . . . 413
v. Logan . . 1029, 1032
v. U. S. Ins. Co. . . 131
Halls v. Coe 277
Halsey v. Norton 224
v. Whitney 266
Halstead v. Schmelzel . . . 1029
v. Shepherd . . 266, 412
Hamersley v. Lambert . . . 447
Hamill v. Hamill . . . 1011
v. Purviss 281
v. Willett 655
Hamilton v. Buxton . . . 482
v. Hamilton 1027
v. Hodges 277
v. Seaman 412
v. Summers . . 266, 269, 413
Hammond v. Aiken . . . 406
v. St. John 665
Hanna v. Flint 20
v. Wray 666
Hanway v. Robertshaw . . . 664
Hanks v. Barber . 967, 1027, 1029
Hapgood v. Cornevell . . 683
Hardenburgh v. Bacon . . . 287
Hardy v. Donnelan . . . 691
v. Mitchell . . 655, 1054
Harper v. Fox 515
v. Lampnig 991
v. Raymond . . 698, 1086

	PAGE
Harper *v.* Wrigley	277
Harp *v.* Tomlinson	392
v. Righter	945
Harris *v.* Harris	1029
v. Hillegass	19, 902
v. Lindsay	440
v. Miller	337
v. Murray	689
v. Pearce	216, 504
v. Schultz	373
Harrison *v.* Clare	433
v. Righter	945
v. Sterry	266
Hartford, etc. R. R. Co. *v.* Kennedy	100
Hartley *v.* Kirlin	412
Hartman *v.* Woehr	27, 227
Hartness *v.* Thompson	483
Hartung *v.* Siceardi	506
Hart *v.* Clark	683, 684
v. Kelly	23
v. Tomlinson	422
v. Withers	278
Harvey *v.* Childs	19
v. McAdams	297
v. Varney	780, 945 1005
Hasbrouck *v.* Childs	807
Haskaskia Bridge Co. *v.* Shannon	264
Haskell *v.* Adams	1029
Haskinson *v.* Elliott	269, 278, 291
Haskell *v.* Johnson	1054
Haskens *v.* Alcott	468
v. Burr	27
Haslett *v.* Notherspoon	4
Haslet *v.* Street	473
Hasselman *v.* Douglas	698
Hastings *v.* Hopkinton	92, 369
Hatch *v.* Foster	654
v. Wood	483
Hatton *v.* Stewart	262
Hauff *v.* Howard	652
Haughey *v.* Strickler	95
Haukley *v.* Becht	20
Havana, etc. R. R. Co. *v.* Walsh	338
Haveland *v.* Chace	383
Havens *v.* Hassey	266
Haven *v.* Wakefield	1031
v. White	470
Hawes *v.* Dunton	266
v. Tellinghast	18
Hawkes *v.* Hinchcliff	451
Hawkins *v.* Hastings' Bank	284
v. Appleby	302
v. McIntyre	19
Hawley *v.* Keeler	19, 58
Hayes *v.* Baxter	259
v. Bement	383
v. Heyer	266, 383, 947, 1011
Haynes *v.* Carter	416
v. Seachrist	278
Hayward *v.* Franch	269
Haywood, etc. Co. *v.* Bryan	129
v. Harmon	265
Hazard *v.* Hazard	18, 19
Hazelhurst *v.* Pope	433, 1028
Heartt *v.* Corning	903, 991
v. Walsh	275, 277, 412
Heaston *v.* Cincinnati R. R. Co.	468
Heath *v.* Gregory	278
v. Waters	666, 774
Heavilon *v.* Heavilon	1029
Hebertson *v.* Jepherson	1055
Heckert *v.* Fegeley	34
Hedge's Appeal	1083, 1084
Heenan *v.* Nash	346
Hefferman *v.* Brenham	475
Heffron *v.* Hunnaford	264
Heffner *v.* Palmer	50
Heimstreet *v.* Howland	17, 34
Heirn *v.* McCaughan	299
Heise *v.* Barth	20
Heil *v.* Greenleaf	1025
Hellman *v.* Mendel	775
Henkel *v.* Heyman	383
Hendecker *v.* Kohlberg	973
Henderson *v.* Barbee	278
v. Haddon	691
v. San Antonio, etc., R. R. Co.	105
Hendrick *v.* Gunn	18
Hendrie *v.* Berkowitz	266
Hennegin *v.* Wilcoxen	1020
Hennessey *v.* Bank	266
Henry County *v.* Yates	278
Henshaw *v.* Root	93
Henn *v.* Walsh	222
Hepburn *v.* Curts	470
Herbert *v.* Haurick	278
v. Odlin	287
Hermanns *v.* Davigneaud	58
Herrick *v.* Ames	572
v. Conant	474
Hertz *v.* Clark	967, 969
Hervy *v.* Van Pelt	406
Hester *v.* Lumpkin	266
Hess *v.* Werts	1084
Hewes *v.* Begley	266
Hewitt *v.* Kuhl	995
v. Patrick	474
v. Rankin	652
Hibbler *v.* DeForest	267
Hickman *v.* Kunkle	329
v. Reeneking	264, 329
Hickson *v.* McFadden	654
Hicks *v.* Branton	482
v. Cram	47
v. Maness	482
v. Wyatt	392
Hicks *v.* Cram	47
Highland *v.* Highland	655

	PAGE
Higgins v. Rockwell	665
Hilligsburg v. Burthe	788
Hilliker v. Loop	467
Hills v. Baily	340
v. Beach	652, 661, 689, 1054
v. Clark	1029
v. Marcy	440
v. Marsh	469
v. McNeil	666
v. Matta	774
v. Packard	467
v. Treat	1045
v. Wiggins	690
Hilman v. Moore	1054
Hinkle v. Reid	760
Hinman v. Little	47
Hinton v. Odenheimer	760
Hirsch v. Adler	879
Hiscock v. Phelps	652
Hitchcock v. St. John	266
Hitchings v. Ellis	19
Hite v. Hite	775, 788
Hoare v. Hindley	222
Hobach v. Huey	468
Hobard v. Lemon	84
Hobart v. Ballard	1013
Hobendobler v. Lyon	680
Hobson v. Porter	278
Hobbs v. Wilson	760
Hodgson v. Baldwin	4, 769, 770
Hodges v. Dames	20
v. Harris	266
v. Holeman	681, 684
v. Parker	787
Hodgman v. Smith	20
Hoeflinger v. Wells	269, 348
Hogan v. Calvert	1026
v. Reynolds	276
Hogg v. Ellis	945
v. Orgill	266
Hogle v. Lowe	652
Hog v. Ellis	383
Holbrook v. St. Paul, F. & M. Ins. Co.	208
Holdane v. Butterworth	408
Holden v. Bloxom	266
v. French	20
v. McFaul	417
v. McMakin	647, 860
v. Peace	652, 788
Holifield v. White	18, 689
Holland v. Butler	468
v. Drake	266
v. Fuller	664, 666
v. Long	415
Hollenback v. More	311
Hollis v. Staley	655
Holliday v. Union, etc., Co.	383
Hollister v. Barkley	783
Holloday v. Elliott	223, 945
Holloway v. Brinkley	18
Holmes v. Burton	348
v. Caldwell	417
v. DeCamp	665
v. Hawes	654
v. Hubbard	867
v. McCrary	222
v. McDowell	1056
v. Moon	652
v. Old Colony Railroad Co.	34
v. Porter	97, 383
v. Shands	412
v. U. S. Ins. Co.	66
Holtgreve v. Wintker	415
Holton v. Holton	1054
Holt v. Kernodle	21, 467
Holyoke v. Mayo	1029
Homer v. Abbe	878
v. Wood	277
Honore v. Colmesnil	676, 788, 809, 1014
Honseal's Appeal	1054
Hood v. Spencer	867
Hook v. Stone	266
Hoopes v. McCann	448
Hopkins v. Carr	433, 441
v. Forsythe	66
v. Johnson	392
v. Smith	93
v. Watt	1027
Horsey v. Heath	266, 1053
Horton's Appeal	230
Horton v. Child	278, 451
Hotchkiss v. English	268
v. Ladd	348
v. Lyon	264
Houser v. Irvine	457
Houston v. Brown	1030
v. Stanton	55
Howard Jones	689
v. Patrick	92, 1030
v. Priest	652
Howell v. Adams	406
v. Harvey	220, 222, 223, 227, 783, 878, 927
v. Reynolds	467
v. Teel	1054
Howe v. Howe	20
v. Kane	451
v. Patterson	417
v. Searing	861
v. Thayer	406
Howland v. Davis	287
Hosack v. Rogers	433, 451
Hosmer v. Burke	369
Hossard v. Smith	83
Hoyt v. Murphy	505
v. Sprague	1047
Hoxie v. Carr	652
Hubball v. Skiles	666

	PAGE
Hubbard *v.* Curtis	972, 1054
v. Guild	412
Hubbell *v.* Woolf	27, 348
Hubble *v.* Perrin	1054
Huckabee *v.* Nelson	27
Hudson *v.* Barrett	948
v. McKenzie	266
v. Neil	652
v. Simon	93
Hughes *v.* Boring	467
v. Ellison	266
v. Waldo	392
v. Walker	468
Human *v.* Cumpffe	278
Humphries *v.* Chastian	412
Hunn *v.* McKee	47
Hunter *v.* Martin	652
v. Whitehead	88
Huntington *v.* Potter	406
v. Lyman	329
Hunt *v.* Benson	680
v. Chapin	267
v. Gookin	945
v. Hall	406
v. Morris	1025
v. Reilley	1025
v. Rogers	1029
v. Smith	972
Hupp *v.* Hupp	506
Hurd *v.* Haggerty	269
Hurlbert *v.* Post	483
Hurst *v.* Hill	412
Hust *v.* Clarke	277
Hutchinson *v.* Onderdock	778
v. Smith	266, 311, 386, 1045
Hutchins *v.* Bank of Tennessee	416
v. Childress	264
v. Gilman	275
v. Hudson	269, 415
v. Kent	236
v. Turner	269
Hyams *v.* Rogers	239
Hyde *v.* Easter	977
Hyer *v.* Burdett	945
Hynes *v.* Stewart	927
Hyrchfielder *v.* Keyser	295
INBUSCH *v.* Farwell	1054
Indiana, etc. Co. *v.* Bates	652
Inglebright *v.* Hammond	92
Ingraham *v.* Foster	928
Innes *v.* Lansing	383
In re Blumenthal	20
Corbett	661
Farmer	652
Forbes	1084
Fry, Treasurer	1083, 1085
Hamilton	86
Ketchum	299
Jewett	48, 50
In re Jordon	311
Merrill	383
Reciprocity Bank	129
Schuchardt	314
Thomas	269
Ward	23
Warren	56
Williams	1054
Irbey *v.* Brigham	92
v. Johnson	1055
v. Vining	406
Ireton *v.* Lewis	878
Irley *v.* Graham	1054
Irvine *v.* Forbes	91, 598, 599
Irvin *v.* Conklin	47
v. Nashville, etc. Ry. Co	18
Irwin *v.* Bidwell	27, 683, 684
Iddings *v.* Bruen	973
Iliff *v.* Brazil	58
Illinois, etc., R. R. Co. *v.* Owens	338
Ihusen *v.* Negley	266
Ives *v.* Miller	1029
Isler *v.* Baker	224, 412
JACKSON *v.* Alexander	383
v. Clymer	1054
v. Crapp	817
v. Holloway	277
v. Geese	222
v. King	1053
v. Sheldon	383, 1055
v. Stanford	652
Jacquin *v.* Buisson	231, 1011
Jacobs *v.* McBee	278
James *v.* Bostwick	278
January *v.* Poyntz	1058
Jaques *v.* Greenwood	1055
v. Marquand	311
Jarman *v.* Ellis	275
Jarvis *v.* Brooks	652, 1054
Jenkins *v.* Howard	1025
v. Peckinpaugh	783
Jenness *v.* Carleton	231, 1045
Jennings *v.* Chandler	1011
v. Estes	264
Jennison *v.* Deering	383
v. Walsh	1029
Jessup *v.* Carnegie	4
v. Cook	783, 967
Jeter *v.* Penn	20
Joacquin *v.* Buisson	383
Johnson *v.* Ames	1054
v. Barry	291
v. Berlizheimer	1045
v. Bernheim	290, 325
v. Butler	961
v. Byerly	295
v. Byrd	482
v. Clark	652

	PAGE
Johnson *v.* Gallivan	95
v. Garrett	973
v. Hersey	1054
v. Kaiser	665
v. Reilley	1029
v. McDonald	383
v. Miller	19
v. Rogers	689
v. Smith	468
v. Wilcox	209
v. Wilson	1029
Johnston *v.* Brown	209
v. Dutton	267, 327, 598
v. Preer	878
Jones' Appeal	652
Jones' Case	277
Jones *v.* Blair	506
v. Booth	329
v. Caperton	376
v. Clark	817, 1086
v. Dexter	945
v. Fegeley	23
v. Hardisty	665
v. Hurst	473
v. Jackson	202
v. Jones	505, 676, 777, 786, 961
v. Luske	277, 1054
v. McMichael	19
v. Neale	652
v. Ratten	278
v. O'Farrel	34
v. Shaw	1028
Joseph *v.* Fisher	92
Joyslyn *v.* Taylor	666
Judd *v.* Hubbell	482
Judge *v.* Braswell	236
Judson *v.* Adams	19
Julio *v.* Ingalls	20
Junek *v.* Hezean	972
Junction, etc., R. R. Co. *v.* Reeve	105
Juneau *v.* Blanchard	383
Justices *v.* McLaren	666
KANAUTH *v.* Bassett	655
Kasson *v.* Crocker	278
Kauffman *v.* Fisher	456, 474
Kean *v.* Johnson	994
Kearney *v.* Fenner	475
Keck *v.* Fisher	284
Keith *v.* Fink	436
v. Pratt	666
Kelleher *v.* Tisdale	92
Keller *v.* Hicks	483
Kelley *v.* Baker	266
v. Devlin	183
Kelley *v.* Eckford	958
v. Greenleaf	572, 809
v. Hurlburt	405
v. Kauffman	760
Kellogg *v.* Fancher	295
Kellogg *v.* Griswold	17
v. Tatten	857
Kemeys *v.* Richards	329
Kemp *v.* Camley	266
v. Coffin	412
Kendall *v.* Rider	652, 1054
Kendrick *v.* Tarbell	344, 971
Kennebeck, etc., R. R. Co. *v.* Palmer	100
Kennedy *v.* Atwater	279
v. Bohanan	406
v. Kennedy	227
v. McFaddon	1029
v. Richey	666
v. Shilton	967
Kenney *v.* Atwater	415
Kenniston *v.* Avery	457
Kent *v.* Wells	482
Kershaw *v.* Kelsey	78
Kerr *v.* Potter	20
v. Sharp	311
Kestner *v.* Sindlinger	1056
Ketchum *v.* Durkee	682, 683
Kidder *v.* McElroy	967
Kimball *v.* Hamilton	266, 295
v. Lincoln	572, 774, 775
v. Thompson	655
v. Walker	777
Kimbro *v.* Bullett	267
Kimmins *v.* Wilson	70, 924
Kingsland *v.* Braisted	1092, 1095, 1096
Kingman *v.* Spurr	699
King *v.* Ham	92
v. Hamilton	652
v. Sarrea	83, 38
v. Weeks	652
v. Whiton	572
Kinsman *v.* Dallon	266
Kipp *v.* McCallum	1030
Kirby *v.* Cannon	483
v. Carpenter	1054
v. Hewitt	412
v. Ingersoll	1010
v. Taylor	433
Kirkman *v.* Snodgrass	415
Kirkpatrick *v.* Tumbull	266
Kirk *v.* Hiatt	264, 412
v. Hodgeson	598
Kitner *v.* Whitlock	208, 266, 267
Klock *v.* Beckman	264
Knapp *v.* McBride	231, 266
Knight *v.* Ogden	689, 690
Knowles *v.* Barnes	666
Knowlton *v.* Reed	1060
Knott *v.* Knott	652
v. Stevens	652
Knox *v.* Buffington	327
v. Hayes	435, 440
v. Schepler	666, 667
v. Spreecher	412
Kochler *v.* Brown	1027
Koningsberg *v.* Launitz	655

PAGE

Korentz *v.* Holtz 392
Kramer *v.* Arthurs 88, 99, 689, 1083
689
Kreis *v.* Gorton . . 1045, 1048
Krutzer *v.* Lyon 236
Krutz *v.* Craig 945
Kuhne *v.* Law 1054
Kuhn *v.* Newman 20
Kull *v.* Thompson 266
Kyle *v.* Roberts 337

Lachaise *v.* Marks 383
Lachomette *v.* Thomas 383
Lacy *v.* Hall 652
Ladue *v.* Hart 505
Ladd *v.* Billings 681
v. Griswold 683
Lafond *v.* Chinn 33
v. Deems . . 223, 1083, 227
Laffan *v.* Naglee 574
Lahey *v.* Kingon 474
Laird *v.* Ivans 406
Lallander *v.* McRae 376
Laler *v.* Jordan 266
Lamalere *v.* Caze . . 968, 1029
Lamer *v.* Mayor 207
v. McCabe 329
Lambden *v.* Sharp 278
Lambkin *v.* Phillips 654
Lamb *v.* Durant 366
v. Grover 19
Lamb *v.* Singleton 406
v. Salters 412
Lancaster Bank *v.* Myerley . . 652
Landolf *v.* Appleton 440
Landry *v.* Landry 1027
Lane *v.* Carpenter 572
v. Doty 665
v. Tyler . . 406, 652, 1027
v. Roche 1025
Lanford *v.* Patton 468
Langan *v.* Hewitt 327
Lange *v.* Kennedy 412
Lang *v.* Fiske 264
v. Waring . 266, 652, 665
Lannan *v.* Clavin 961, 972
Lansing *v.* Gaine . 412, 413, 415
Lanzer *v.* Fricke 47
Larkins *v.* Rhodes 88
Lararus *v.* Long 264
Lash *v.* Arnold 469
Latham *v.* Simmons 690
Lathrop *v.* Atwood 867
v. Wightman 690
Latting *v.* Fassman 945
Lauffer *v.* Cavett 652
Laughlin *v.* Lorenz 1060
Laurence *v.* Merrifield . . . 383
Lawrence *v.* Clark 1029
v. Kensting 333

PAGE

Lawrence *v.* Dale 239
v. Robinson . . 18, 220
v. Taylor 275
v. Trustees 1053
Laylin *v.* Know 760
Layton *v.* Hastings . . . 278, 652
Laverty *v.* Burr 266
Lazar *v.* Pearson 1029
Leabo *v.* Goode . . . 213, 440
v. Renshaw 1029
Leach *v.* Leach 806
Learned *v.* Ayers 1029
Lea *v.* Guice 23, 264, 822
Ledden *v.* Colby 666
Leech *v.* Harris . . . 1094, 1095
Lee *v.* Bullard 34
v. Lashbrooke . 774, 787
v. Onstatt 278
Lefaver *v.* Landes 264
Lefevre's Appeal 652
Lefever *v.* Underwood 783
Leffeer *v.* Rice 269
Leftwich *v.* Clinton 181
v. Leftwich 991
Leggett *v.* Hyde 23, 34
Leidy *v.* Messinger 1029
Leighton *v.* Hosmer 838
Lemon *v.* Fox 348
Lengle *v.* Smith 33
Leonard *v.* Dutton 1027
v. Martin 973
v. Wildes 412
v. Winslow 277
Leroy *v.* Johnson 237
v. Lowber 222
Leslie *v.* Wiley 486
Lester *v.* Pollock 655
Lesure *v.* Norris 50
Levitt *v.* Peck 327
Levi *v.* Karrick . . . 774, 837
Levy *v.* Cadet 456
v. Cowan 689
v. Levy 1054
v. Lock 383
v. McGowan 689
v. McDowell 93
Lewison *v.* Drew 666
Lewis *v.* Allen 264
v. Conrad 1054
v. Greider 34
v. Moffet 774
v. Post 93, 95
Lilly *v.* Kroeson 220
Lime Rock Bank *v.* Phetteplace . 652
Lime Rock, etc., Ins. Co. *v.* Treat 329
Lincoln *v.* White 652
Lindell *v.* Lee 1030
Lindsey *v.* Edmiston 23
Linford *v.* Linford 1054
Linton *v.* Hurley 299

PAGE

Leutner *v.* Milliken 23
Littel *v.* Fitch 266
Little *v.* Clarke 415
v. Hamilton 330
v. Hazard 278
v. Snedecor 652
v. Stanton 967
Livingston *v.* Coxe . . 190, 216
v. Lynch . 99, 598, 822, 1083
Livingstone *v.* Harvey . . . 468
v. Hastie 266
v. Pittsburg, etc., R. R. Co. 239
v. Roosevelt . 56, 236, 266
Lloyd *v.* Thomas 412
Locke *v.* Lewis . . . 295, 655
Lockridge *v.* Wilson 92
Lockwood *v.* Beckwith 572
v. Comstock 412
v. Mitchell 666
Locke *v.* Stearns 302
Loeschigk *v.* Hartfield . . . 1045
Logan *v.* Bond 211
v. Cragin 376
London, etc., Socicty *v.* Hagerston Bank 236
Loney v. Bayly 1015
Long *v.* Carter 236
v. Storey 412
v. Majestre 945
Loomis *v.* Barker 299
v. Marshall . . . 19, 20
v. McKenzie 1011
v. Pearson 412
v. Pearson 473
Lord *v.* Anderson 973
v. Baldwin 1054
v. Proctor 23
Lothrop *v.* Wightman 690
Loury *v.* Brooks 19
Lovejoy *v.* Bowers 295
v. Spafford . . . 416, 406
Lovney *v.* Gillenwaters . . . 783
Lowe *v.* Lowe 652
v. Penny 415
Lower *v.* Denton 1029
Lowery *v.* Drew 278
Lowry *v.* Cobb 572
v. Stotzer . . . 1094, 1095
Lucas *v.* Atwood 1054
v. Bank of Darien . 265, 415
v. Cole 27
v. Saunders 278
Lumberman's Bk. *v.* Pratt . . 412
Lunt *v.* Lunt 208
v. Stevens . . . 293, 433
Ludington *v.* Bell 440
v. Taft 945
Ludlow *v.* Cooper . 56, 88, 652, 1047
Lusk *v.* Graham 973
v. Smith 412
Lycoming, etc., Co. *v.* Barringer 47

PAGE

Lyman *v.* Lyman . . 55, 774, 775
Lynch *v.* Bilting 967
Lyndon *v.* Gorham 689
Lyon *v.* Johnson 415
v. Malone 1028
Lysaght *v.* Phillips 433

Mabbett *v.* White 266
Machinist's Bank *v.* Krum . 482
Machinists, etc., Bk. *v.* Dean . 97
Mackay *v.* Bloodgood 278
Mackey *v.* Auer 1027
Mackintosh *v.* Tatman . . . 867
Mackin *v.* Crotcher 348
Mack *v.* Woodruff . 505, 680, 682
Macy *v.* Combs 18
v. DeWolf . . . 67, 66
Maddock *v.* Astbury 848
Madison Co. Bk. *v.* Gould . . 383
Mfg. Bank *v.* Gore 269
Magill *v.* Merrie . 219, 405, 266
Maginnis *v.* Crosby 760
Maguire *v.* Lawrence 383
Mahan *v.* Sherman 1028
Maher *v.* Bull 972
Maier *v.* Canavan 440
Mainwaring *v.* Griffin . . . 287
Major *v.* Hawkes 275
Maley *v.* Brine 807
Maltby *v.* Northwestern, etc., R. R. Co. 239, 333
Manck *v.* Manck 652
Manhattan, etc., Mfg. Co. *v.* Sears 18, 33, 68, 91
Manhattan Co. *v.* Ledyard . . 266
Manning *v.* Gasharie 99, 369, 1083, 1084
v. Hayes 266
v. Wadsworth . . . 917
Mann *v.* Etna Ins. Co. . . . 278
v. Higgins 681
v. Locke 413
Mantonya *v.* Hatch 294
Manufacturer's Bank *v.* Winship 266
Manufacturing Bank *v.* Gore 302
Maples *v.* Geller 665
Mardis *v.* Shackleford . . . 216
Marine Co. *v.* Carver . . . 262
Markham *v.* Buckingham . . 468
v. Hazen 392
v. Jones 47
Marks *v.* Hill 655
v. Sigler 98
v. Stein 18
Marlatt *v.* Scantland . . . 1045
v. Jackman . . . 231, 209
Marquand *v.* N. Y. M'f'g Co . 224, 230
Marshall *v.* Hull 468
v. Johnson . . 579, 994

PAGE

Marsh's Appeal 775
Marsh v. Northwestern Ins. Co. . 18
v. Gold 281
v. Thompson Nat'l B'k 262, 266, 281
Marston v. Dewberry 689
Marten v. Ehrenfels 92
M'Arthur v. Ladd 16
Martin v. Davis 451
v. Good 220
v. Johnson 208
v. Kaffroth 264
v. Kelley 468
v. Kirk 410
v. Pensacola etc. R. R. Co. 105
v. Searles 415
v. Solomon 1027
v. Tedwell 18
v. Thrasher 265
v. Van Schaack 861
v. Walton 415, 408
Marvin v. Buchanan 338
v. McRae 665
v. Trumbull 652
Marx v. Bloom 1029
Marye v. Jones 220
Mason v. Connell 697, 925
v. Dennison 483
v. Eldred 20
v. Hackett 451
v. Jonett 433
v. Potter 17, 19
v. Tiffany 369, 404
v. Tipton 1025
v. Wickersham 440
Masterson v. Botts 1094
Massey v. Pike 278
Matthewson v. Allen 570
v. Clarke 946
Matthews v. Dare 327
v. Felche 47
v. Hunter 652
v. Paterson 611
Matlock v. James . . . 652. 1054
v. Matlock . . . 652, 680
Matter of Lowenstein . . . 266
Matteson v. Mathanson . . 1045
Maude v. Rodes . . . 878, 928
Maudlin v. Branch Bank . 266, 281, 329, 406, 415
Maupin v. Daniel 991
Maxey v. Averill 1053
v. Strong 408
Maxwell v. Day 440
Mayberry v. Barinton . . . 281
Mayer v. Clark 655
v. Garber 661
Maynard v. Fellows 266
Mayor v. Hawks 412
McAdams v. Hawes . . 230, 232
McAllister v. Montgomery . . 652

PAGE

McArthur v. Chace 383
McBride v. Hogan 278
McCall v. Oliver 1027
McCabe v. Franks 991
McCament v. Gray 945
McCandless v. Hadden . . . 665
McCart v. Lewis 278
McCarthy v. Nash 47
McCauley v. Cleveland . . . 19
v. Fulton 680
McChesney v. Kipp 1028
McClellan v. Cumberland Bank 433
McClelland v. Lindsey . . . 97
v. Remsen . . 266, 284
McClung v. Copehart 963
McColloh v. Dashiell . . . 1054
McConkey v. Rogers 470
McConnell v. Denver . . . 1086
McCormick's Appeal . . 652, 974
McCormick v. Littler . . . 83
v. McCormick . . 682, 788
McCoon v. Galbraith 417
McCotter v. McCotter . . . 236
McCowin v. Cubbison 408
McCrary v. Slaughter 18, 20, 267, 291
v. Robeson 783
McCulloch v. Judd 482
McCullough v. Sommerville 266, 278
McCrae v. Robeson 783
McDonald v. Beach 1054
v. Eggleston 278
v. Parker 339
McDougal v. Banks 652
McDuffie v. Bartlett . . 90, 1055
McElvey v. Lewis 220
McElroy v. Ludlam 264
v. Melear 408
McFadden v. Hunt 470
McFadgen v. Harrington . . 264
McFarland v. Crary 216
v. Lewis 95
McGehee v. Dougherty . . . 1027
McGill v. Dowdle . . 18, 267
v. McGill . . 404, 1053
McGlensey v. Cox . . 698, 841
McGowan Bro's. Pump Machine Co. v. McGowan 861
McGowan v. Sprague 683
McGrath v. Sinclair 652
McGraw v. Pulling 820
McGreary v. Chandler . . . 1084
McGregor's case 266
McGregor v. Cleveland . . 344, 468
v. Ellis 655
McGrew v. Walker 90
McGuire v. Blanton 281
v. O'Hallaran 92
v. Ramsey . 652, 878, 963
McGunn v. Hamlin . . 27, 970
McHose v. Wheeler 129

PAGE

McIlvaine v. Armfield . . . 58
McInewaus v. Hamlin . . . 281
McIntire v. M'Larenn . . . 268
McKaig v. Hebb . . 878, 945
McKee v. Griffin 652
v. Hamilton . 269, 294, 440
McKenzie v. Dickinson . . 574
McKelvey's Appeal . . 963, 967
McKeown v. Guild . . . 963
McKinney v. Smith . . . 287
McKinnon v. Brights . . . 277
McKnight v. McCutchen . . . 1029
McKowan v. McGuire . . . 666
McLain v. Carson 1053
McLaughlin v. Simpson . . 945
McMahon v. McClellan . . . 572
v. Rauhr . . 1093, 1097
McLellan v. Pennell . . . 264
McMichael v. Ravul . 991, 1047
McMullen v. McKenzie . . 93
McNair v. Platt 277
v. Rayland . . 783, 964
McNally v. Kerswell . . . 665
McNamara v. Draft . . . 97
McNeill v. Reynolds . . 97, 236
McNutt v. King 224
v. Strayhorn . . 266, 515
McPherson v. Pemberton . . 199
v. Rathbone . . . 95, 412
McRae v. McKenzie . . 783, 972
McSherry v. Brooks . . . 1027
McVicker v. Ross 1098
McWhorter v. McMahan . . . 295
Meachen v. Batchelder . . . 266
Meacher v. Coxe . . 2.7
Meador v. Hughes . . 18, 392, 680
Mead v. Witherow . . . 689
v. Shepard 291
Meaher v. Cox. 853
Mears v. Jones 47
Meason v. Kaine 915
Mechanics Bank v. Dakin . . . 275
v. Foster 266
v. Livingston . . . 415
Mecutcheon v. Kennedy . . . 329
Meech v. Allen 1054
Medberry v. Soper 325
Meggill v. Finney 413
Meilly v. Wood 652
Melane v. Spencer . . . 451
Mellinger v. Parsons 410
Menagh v. Whitwell . 655, 680, 698, 1055
Mercantile Bank v. Coxe . . 342
Mercer v. Sayre 413
Merchants', etc., Bank v. Stone . 4
Merchant v. Belding . . . 236
Meridan Nat. Bank v. Brandt . 680
Merit v. Pollys 406
Merrick v. Brainard . . . 698
v. Gordon 47

PAGE

Merrill v. Green . . . 867, 1028
Merritt v. Dickey 652
v. Williams 415
Merriwether v. Hardeman 807, 968, 1029, 1030
Mershom v. Hobensack . . 47
Merwin v. Playford . . . 20
Meserve v. Andrews . . 20, 791
Messner v. Lewis . . . 468
Metcalf v. Officer . . 23, 92
v. Redman . . . 27
Meyer v. Atkins 408
Mickle v. Peet 1030
Mick v. Howard 266
Mifflin v. Smith . . 56, 269, 823
Miles v. Von Deyn . . . 482
Millard v. Ramsdell . . . 1046
Millerd v. Thorn . . . 448
Miller v. Andres . . . 1028
v. Bartlett 20
v. Chandler 20
v. Dow 277
v. Estill 683
v. Hines 266
v. Hughes . . 18, 266
v. Jones . . 945, 1045
v. Knauff 1032
v. Lord 788, 967
v. Manice 329
v. Miller 1055
v. Northern Bank . . . 369
v. Price 19, 266, 275, 655, 680
v. Procter 652
v. Thorn 1032
v. White 1096
Millikin v. Loring . . . 412
Mills v. Barber 266
v. Dickson . . . 474
v. Fellows . . . 774, 961
Milwaukee R. R. Co. v. Field . 105
Miner v. Downer . . . 341
v. Pierce 690
Minor v. Gaw 277
Mississippi, etc., R. R. Co. v. Harris 131
Mitchell v. Dale 483
v. Darmon . . . 376
v. Dobson 436
v. Read . . . 574, 857
v. Rich 474
v. O'Neale . . . 70
Mitchum v. Bank of Kentucky . 406
Mittnight v. Smith . . . 1054
Mix v. Muzzy 329
Modisett v. Lindley . . . 278
Moderwell v. Mullison . . 652
Moffat v. Farquharson . . 878
v. Moffatt 945
v. Thomson . . . 1045
Mohawk, etc., Co. v. Niles . . 47
Moister's Appeal . . . 296

PAGE

Moline, etc., Man'f'g Co. v. Webster 1054
Monroe v. Ezzell 467
v. Hamilton . . . 230, 945
Montanya v. Hatch . . . 958, 993
Montague v. Reakert . . . 408
Montjoys v. Holden 1025
Moody v. Payne 1055
v. Rathburn 27
Moale v. Hollins 451
Moon v. Story . . . 611, 788
Moorehead v. Gilmore . . . 266
v. Wriston 392
Moore's Appeal 1053
Moore v. Bare 676
v. Brink . . . 1096, 1089
v. Bates 376
v. Brink 5
v. Burns 468
v. Gano 1032
v. Huntington . 20, 878, 973
v. Lackman 408
v. Smith 17, 20
v. Theiber 791
v. Wheeler 973
Montgomery v. Boone . . . 278
Moran v. LeBlanc 1027
v. Prather 281
Morcein v. Andrews 266
Mords v. Gleason 698
Moreau v. Edwards 295
v. Saffarans 652
Morgan v. Allen 33
v. Hunes 1025
v. Olney 652
v. Richardson 474
v. Roberts 417
v. Skidmore 1054
v. Stearns 18
Moriarty v. Bailey 277
Morlitzer v. Bernard . . . 291
Morin v. Martin 1029
Moritz v. Phelps . . . 572, 1025
Morrisey v. Weed 1097
Morrill v. Colehour 652
Morrison v. Blodgett . . . 690
v. Cole 20
v. Kurtz 1054
v. Mendenha'l 284
v. Perry 412
v. Smith 783
v. Stockwell 1028
Morris v. Allen 787
v. Hillery 470
v. Jones 278
v. Morris 1054
Morrow v. Riley 1027
Morse v. Bellows 278
Morss v. Gleason . . . 419, 683
Morton v. Ostrom 652

PAGE

Mosley v. Ganett 699
Mosseau v. Thebens 392
Moss v. Jerome 47
v. McCall . . . 786, 787, 993
Mosely v. Garrett 699
Mourain v. Dalamre 788
Moutz v. Morris 505
Motley v. Jones 33
Mowatt v. Howland 416
Mowbray v. Lawrence . . 691, 1055
Moyess v. Brumeaux 92
Mudd v. Bast 231
Mudge v. Treat 417
Muir v. Leitch 1054
Mullany v. Keenan 1026
Mullindore v. Scott 867
Mumford v. Murray . . . 433, 780
v. Nicoll 19, 56
Munroe v. Cooper . . . 266, 329
Munro v. Whitman 19
Murchison v. Warren 698
Murdock v. Martin 1029
v. Mehlhop 698
Murphy v. Camden 275
v. Crafts 784
v. Abrams 652
Murray v. Bogart . . . 697, 1029
v. Elston 968
v. Johnson 27
v. Mumford 1045
Murrill v. Neill 1054
Musier v. Trumpbour 19
Musser v. Brink 19
Mutual Benefit Ins. Co. v. Hildyard 78
Mutual, etc., Institution v. Enslin 1045
Muzzy v. Whitney 20
Mygatt v. McClure 413
Myatts v. Bell 412
Myers v. Bennett 991
v. Higgins 408
v. Smith 760
v. Winn 383
Mynderse v. Snook 468
Myrick v. Dawe 1029

Naglee v. Minturn 488
Nall v. McIntyre 277
Napier v. Catron 278
v. M'Leod 413
National Bank of Metropolis v. Sprague . . . 652, 1054
National Bank v. Norton 415, 412
Natl. Bk. of Jacksonville v. Mapes 275, 277

PAGE

National Bank of Schuylerville *v.* VanDerwerker 1092, 1093, 1095
National, etc., Bank *v.* Landon 4, 18, 266, 325
Nave *v.* Sturges 832
Neal *v.* Hassan . . . 412, 457
Nebraska R. R. Co. *v.* Colt . . 376
v. Lett 15
Neil *v.* Childs 869
Nelson *v.* Haynor . 572, 573, 630
v. Hill 1053
v. Lloyd . . . 95, 482
v. Neeley 266
Noonan *v.* McNab 841
Newbiggin *v.* Pillans 84
Newbran *v.* Snieder 23
Newcomet *v.* Brolzman . . . 406
Newell *v.* Smith 266
Newland *v.* Tate . 54, 774, 775
Newman *v.* Bagley 266
v. Bean . . . 19, 690
New York Iron Mine *v.* Negaunee Bank 4
N. Y. Fire Ins. Co. *v.* Bennett . 266
N. Y. Life Ins. C. *v.* Statham . 78
N. Y. Marble and Iron Works *v.* Smith 1094
Nicholson *v.* Janeway . . . 969
Nichols *v.* Cheairs 333
v. English 339
v. Hughes 236
v. Prince 867
Nickels *v.* Mooring 412
Nicklaus *v.* Dahn 665
Nicoll *v.* Ogden . . . 652, 1097
v. Mumford . 18, 698, 1054
Niday *v.* Harvey 451
Niehoff *v.* Dudley 18
Niles *v.* Williams 945
Nims *v.* Bigelow 1027
Niven *v.* Spickerman 1085
Nixdorf *v.* Smith 436
Nixon *v.* Downey 264
Noblit *v.* Bonaffon 47
Noble *v.* McClintock 277
Noel *v.* Bowman 760
Noonan *v.* Orton 841
Norman *v.* Huddliston . . . 967
Norment *v.* Johnson 277
Norris *v.* Howard 857
v. Vernon 655
Norton *v.* Thacher . . . 236, 239
North Penn. Coal Co.'s Appeal 337
North River Bank *v.* Stewart 1054
North *v.* Mudge 474
Norwent *v.* Hull 20
Noyes *v.* Cushman 33
v. New Haven, etc., R. R. Co. 277
Nussbaumer *v.* Becker 408

PAGE

Nutting *v.* Colt 20
Nutt *v.* Hunt 268

Oakey *v.* Rabb 1054
Oakley *v.* Aspinwall . . . 33, 264
Oates *v.* Brown 475
O'Bannon *v.* Miller 655
v. Simrall 278
O'Brien *v.* Vantine 264
v. Hanley 991
O'Bryan *v.* Gibbons 1011
O'Conner *v.* Stark 972
Odiorne *v.* Maxcey . . 264, 541
v. Woodman 1029
Offutt *v.* Scott 1045
Ogden *v.* Astor . 18, 666, 1046
Olcott *v.* Wing 88, 1017
Olery *v.* Brown . . . 1093, 1095
Oliphant *v.* Matthews . . . 342
Oliver *v.* Gray 58
v. McLean 652
Olleman *v.* Reagan 760
Olmstead *v.* Hotailing . . . 294
Olson *v.* Morrison 655
O'Neill *v.* Lamb 19, 88
Onondaga Bank *v.* DePuy . 269
Ontario Bank *v.* Hennessey 208
Ormsbee *v.* Davis 266
Orielly *v.* Brady 1047
Osbey *v.* Reiner 20
Osborne *v.* Brennan 33
v. McBride 652
Osgood *v.* Glover 266
Ostrom *v.* Jacobs 264
Otis *v.* Sill 652
Ottoman Cahvey Co. *v.* Dane . 208
Overholt's Appeal 652
Overton *v.* Tozer 474
Owen v. Collins 652
v. Davis 1054
v. Hetherington . . . 698
v. Mackall 1060
Owings *v.* Low 264
v. Trotter 348
Oxley *v.* Willis 413
Ozeas *v.* Johnson 1030
v. Tolman 1029

Paddock *v.* Fletcher 115
Page *v.* Brant . . 415, 416, 483
v. Marshall 971
v. Thompson 1029
v. Van Kirk 222
Pahlman *v.* Cranes 1054
v. Taylor 236, 281
Paine *v.* Moore . . . 1026, 1027
v. Thatcher 1025

PAGE

Palmer *v.* Dodge . . . 412
v. Elliott 348
v. Lawrence . . . 151
v. Pinkham . . 50, 95
v. Stevens . . . 344
v. Tyler 945
Pannell *v.* Phillips 346
Parish *v.* Lewis . 680, 683, 1053
Parker *v.* Bowles 652
v. Canfield . . 34, 440
v. Cousins 412
v. Fergus 34
v. Gregg 467
v. Jackson . . . 482
v. Jonti 991
v. Parker 680
Parkhurst *v.* Kinsman . . 68
v. Muir 967
Park *v.* Simmons . . . 1093
v. Wooten 405
Parmalee *v.* Lawrence . . 433
v. Wiggenborn . . . 392
Parmenter *v.* Kingsley . . 867
Parnell *v.* Robinson . 574, 978
Parsley *v.* Ramsey . . 92, 208
Partridge *v.* Wells . . . 574
Partner *v.* Leiterloh . . . 266
Parviance *v.* McClintle . . . 18
Patch *v.* Wheatland . . . 284
Pate *v.* Bacon 468
v. First Nat'l Bk. . . 266
Paton *v.* Wright . . . 266
Patterson *v.* Blanchard . 17, 19
v. Brewster 337
v. Camden 441
v. Martin 967
v. Silliman . . 652, 745
v. Ware 795
Patteson *v.* Norris . . . 408
v. Calhoun . . . 775
Patten *v.* Patten 993
Payne *v.* Mathews . . . 1054
v. Slate 412
Peacey *v.* Peacey 867
Peacock *v.* Cummings . . 598
Pearce *v.* Pearce . . 973, 974
Pearl *v.* Pearl 680
Pearson *v.* Keedy . . 680, 1053
v. Parker 467
Peace *v.* Rush 655
Pecker *v.* Hall 412
Peck *v.* Fisher 1054
v. Lusk 47
Peek *v.* Schultz 691
Pecot *v.* Armelin . . . 652
Pendleton *v.* Wambersie . . 947
Penniman *v.* Munson . . . 68
Pennock *v.* White 230
Penny *v.* Black 643
Penn *v.* Kearney 283
v. Stone 1030

PAGE

Penn *v.* Whitehead 80
Penobscot, etc., R. R. Co. *v.* Dummer 105
Penrock *v.* Swayne . . . 1031
People's Bank *v.* Shryock 683, 690
People *v.* Judges of Duchess . 278
v. Till 690
Perkins *v.* Perkins . . . 945
Perley *v.* Brown 1029
Perman *v.* Tunno . . . 1055
Perrine *v.* Hankinson . . . 20
Perrin *v.* Keene 412
Perry *v.* Butt . . . 18, 93
v. Holloway 661
v. Randolph . . 93, 333
v. Spencer 867
Person *v.* Carter 278
v. Warren 83
v. Wilson 643
Persse & Brooks Paper Works *v.* Willett 665
Perth-Amboy Manf'g Works *v.* Condit 666
Peterson *v.* Poignard . . . 945
v. Roach 269
Peters *v.* Horbach . . . 311
Petit *v.* Chevelier . . . 1012
Petriken *v.* Collier . . . 56, 412
Pettee *v.* Appleton 33
v. Orser 266
Pettes *v.* Bloomer 278
Pettis *v.* Atkins 392
Peyton *v.* Lewis 392
v. Stratton 277
Pfeffer *v.* Steiner 666
Pfeiffer *v.* Maltby 198
Pfernean *v.* Henkle . . . 383
Pferrion *v.* Koch 655
Phelan *v.* Hutchinson . . 412
Phelps *v.* Brewer 473
v. Neeley 1064
Philadelphia, etc., R. R. Co. *v.* Hickman 105
Philip *v.* Turner 775
Phillippi *v.* Phillippi . . . 964
Phillips *v.* Crammond . . . 574
v. Lockhart . . . 1029
v. Nash 27, 405
v. Phillips 28
v. Purington . . 66, 264
v. Reeder . . 412, 973
Piatt *v.* Oliver . . 295, 652, 664
Pickerell *v.* Fisk 78
Pie *v.* Cuzes 1026
Pickering *v.* Templeton . . 100
Pierce *v.* Bruce 485
v. Bryant 383
v. Cameron 451
v. Covert 1017
v. Cubberly 931
v. Daniels 783
v. Hickenburg . . . 277

PAGE

Pierce *v.* Jackson . 266, 268, 302, 1054, 1055
v. McClellan . . . 570
v. Pass 277
v. Shippee . . . 18
v. Turman 680
v. Wilson 682
Pierpont *v.* Graham . . . 266
Pierson *v.* Hooker 278
v. Stienmeyer . . 95, 181
Pike *v.* Bacon 278
v. Douglass . . . 262
v. Hart 1030
Pillsbury *v.* Pillsbury . . . 58
Pinckney *v.* Keyler 290
v. Wallace 1045
Pine *v.* Ormsbee . . .220, 977
Pipe *v.* Baleman . . . 1084
Piper *v.* Smith . . . 652, 786
Pitche *v.* Barrows . . . 406
Pitkin *v.* Pitkin 1054
Pittsburg, etc., R. R. Co. *v.* Clarke 100
v. Gozzam . . . 100
v. Stewart . . . 129
Pitts *v.* Waugh . . 238, 88, 652
Place *v.* Sweetzer . . . 691
Platt *v.* Halen . . . 467, 510
v. Platt 958
Pleasants *v.* Fant 34
Plumer *v.* Lord . . . 33, 85
Poindexter *v.* Waddy . . . 266
Poillon *v.* Secor 52
Polk *v.* Buchanan 34
v. Oliver . . . 415, 416
Pollard *v.* Stanton 22
Pollock *v.* Williams . . . 327
Pomeroy *v.* Benton . . 809, 968
v. Coons 266
v. Sigerson 34
Pond *v.* Clark . . 777, 788, 790
Poole *v.* Gist 303
v. Lewis 338
Pooley *v.* Whitmore . . . 266
Pool *v.* Delaney 1028
Popper *v.* Scheider . . . 1012
Pope *v.* Cole 665
v. Hayes 867
v. Nance 420
v. Randolph . . . 1027
v. Risley . . 413, 415
v. Salsman . . . 945
Porter *v.* Cresson 468
v. Gunnison . . . 329
v. Wilson 95
Portland Bank *v.* Hyde . . 469
Portsmouth *v.* Donaldson . . 945
Posey *v.* Bullett 278
Postlewaite *v.* Howes . . . 1053
Post *v.* Kimberly . 18, 56, 295
Potter *v.* Dillon 266
v. Gray 97

PAGE

Potter *v.* McCoy 278
v. Moses 21
v. Price 266
v. Search 1095
Pote *v.* Phillips 1029
Potts *v.* Blackwell . . . 655
Powell *v.* Graves . . 968, 1028
v. Hopson . . . 231
v. McGuire 945
v. Messer 329
v. North 231
Powrie *v.* Fletcher . . . 505
Pratt *v.* Langdon 33
v. McHatton 181, 412, 777, 788, 972, 973, 1015
v. Page 406
Pray *v.* Mitchell 1029
v. Morse 570
Prentiss *v.* Foster 266
v. Kelley 98
v. Sinclair 415
Prensser *v.* Henshaw . . . 392
Price *v.* Alexander . . . 20
v. Hicks . . 652, 1045
v. Hunt 92, 659
v. Towsey 406
Prince *v.* Crawford . . . 267
Princeton, etc., Co. *v.* Gulick 406
Prudhomme *v.* Henry . . 413
Puckett *v.* Stokes 348
Purdy *v.* Lacock . . . 1054
v. Powers 277
Pugh *v.* Carrie 652
Pursley *v* Ramsey 415
Purviance *v.* Sutherland . . 278
Purvines *v.* Champion . 1027, 1029
Pusey *v.* Dusenbury . . . 383
Putnam *v* Robbins . . . 652

Quackenbush *v.* Sawyer . . 59
Quincy *v.* White 97
Quiner *v.* Marblehead Ins. Co. 266
Quine *v.* Quine 676
Quinlivan *v.* English . 994, 1016

Raborg *v.* Bank of Columbia 666
Radcliffe *v.* Varner . . 290, 295
Raigul's Appeal 680
Rainey *v.* Nance 1054
Rammelsburg *v.* Mitchell 652, 666, 861
Ramsey *v.* Deas 111
v. Ins. Co. 151
Randell *v.* Morrell 994
v. Tates 92
Randle *v.* State 20
Randolph Bank *v.* Armstrong 266
Randolph *v.* Daly . . . 515
v. Peck 408
Rankin *v.* Jones . . . 655

PAGE

Rankin *v.* Shepherdson . . . 392
Ransom *v.* Loyless 415
v. Vandeventer . . . 655
Rancey *v.* McBride 295
Ratzer *v.* Ratzer 676
Raust *v.* Hauselt 329
Rawson *v.* Taylor 448
Raymond *v.* Carine 972
v. Putnam 963
Ray *v.* Bogert 924
Re Clap 666, 1064
Re Cook 655
Re Great Western Tel. Co. . . 698
Re King 383
Re Santhoff 680
Re Shepard 230
Re Terry 383
Re Warren 348, 1054
Read *v.* Nevitt 841
Reber *v.* Columbus 484
Reboul *v.* Chalker 27
Redfield *v.* Widdleton . . . 928
Reece *v.* Hoyt 412
Reed *v.* Girty 452
v. Johnson 469
v. Murphy 20
v. Shephardson . . . 1055
v. Wessel 570
Reese *v.* Bradford . . 655, 698
Reeves *v.* Ayers . . 652, 655
Reid *v.* Videl 915
Reilley *v.* Smith 415
Reimsdy *v.* Kane 346
Reinheimer *v.* Hemingway . . 690
Reis *v.* Hellman 783
Remick *v.* Ewing 231
Remington *v.* Allen 1025
v. Cummings 474
Remson *v.* Pomeroy 665
Renfrow *v.* Pearce . . 311, 1018
Reno *v.* Crane 649
Renton *v.* Chaplain 230, 690, 691, 1011
Reppert *v.* Colvin 456
Reuben *v.* Cohen 262
Reybold *v.* Dodd . 92, 774, 788
Reynolds *v.* Cleveland . 56, 338
v. Hicks 54
v. Mardis 787
v. Walker 302
Rhea *v.* Varney 599
Rhiner *v.* Sweet 972
Rhodes *v.* Williams . . 878, 1015
Riarl *v.* Wilhelm 1029
Rice *v.* Austin 19, 1054
v. Barnard 1054
v. Barrett 47
v. Doniphan 475
v. McMartin 652
v. Richards 665
v. Shuman 643

PAGE

Rice *v.* R. I., etc., R. R. Co. . 151
Richardson *v.* Farmer . . 238
v. French 269
v. Fuller 474
v. Hewitt 20, 23
v. Hogg 383
v. Lester 284
v. Mores 412
v. Wyatt 991
Richards *v.* Baurman . . 222, 1008
v. Fisher 406
Richler *v.* Poppenhausen . 665, 1060
Richmond *v.* Judy 57
Rich *v.* Davis 266
Riddle *v.* Etting 412
Rider *v.* Gilbert . . 676, 1054, 1055
Ridgley *v.* Carey 1054
v. Dobson 57
Ridge *v.* Alter 475
Ridgway's Appeal 652
Ridgway *v.* Grant . . 1026, 1027
Riggs *v.* Stewart 1029
Riner *v.* Tousle 993
Riper *v.* Poppenhausen . . . 383
Ripley *v.* Colby 56, 97
Rippey *v.* Evans 90
Roach *v.* Pendergast 222
v. Perry . . . 676, 774
Robbins *v.* Butler . . 99, 1083
v. Fuller 412
v. Laswell 820
v. Warde 92
v. Wells 1095
Robb *v.* Mudge 406, 655
v. Stevens 1054
Robertshaw *v.* Hanway 485, 652, 664
Robertson *v.* Baker . . 652, 683
v. Corsett 652
v. Miller . . 823, 832
Roberts *v.* Filter 1029
v. Kelsey . . 231, 945
v. Law 1045
v. McCarty 652
v. McKee 994
v. Mobile, etc., Railroad Co. 105
v. Oldham 1058
v. Ripley 1030
v. Shepard 266
v. Strang 433
v. Totten 295, 783
Robinson *v.* Aldredge . . . 329
v. Bullock 19
v. Crowder 266
v. Davidson 977
v. Gilfillian 649
v. Green . 90, 92, 1025, 1029
v. Gregory 266
v. McIntosh . . . 266, 383
v. Taylor 412
v. Thompson 665

PAGE

Robinson v. Warden . . . 406
v. Williams 1027
Rochester v. Trotter . . . 237
Rockwell v. Wilder 1028
Rodes v. Rodes 777
Rodriguez v. Hefferman . . 698
Rogers v. Batchelor . . 277, 295
v. Kichline 467
v. Nichols . 47, 230, 1055
v. Rogers . . 469, 1031
Rollins v. Stevens . . . 281
Rolston v. Clerk 281
Rony v. Buckland . . 269, 299
Ropes v. Upton 857
Roop v. Rogers 1055
Roosvelt v. McDowell . . . 665
Rootes v. Welford . . . 412
Rorke v. Russell 1094
Rose v. Baker 269
Ross v. Cornell . . . 1027, 1029
v. Everett . . . 475
v. Henderson . . 277, 652
v. Howell 474
v. Roberts 867
v. West 1026
v. Whitefield . . . 287
Roth v. Moore 338
Rothwell v. Dewees . . . 486
Rouiller v. Wernicke . . . 84
Routen v. Bostwick . . . 991
Rowand v. Frazer 654
Rowland v. Long . . . 33
v. Miller 973
Rowley v. Stoddard . . . 433
Royster v. Johnson, 775, 974
Roys v. Villas 1045
Ruckman v. Decker . . . 643
Ruddick v. Otis 19
Ruffner v. McConnell . . . 278
Ruhe v. Burnell 92
Russell v. Annable . . . 278
v. Byron 945
v. Green . . . 277, 783
v. Grimes . . . 1029
v. Leland . . . 230, 266
v. Miller . . . 652
v. Miner Outfit . . . 1029
v. Swann 485
Rust v. Hauselt 277
Ruth v. Colvin . . . 266
Rutledge v. Squires . . . 329
Ryder v. Wilcox . . . 20
Ryerson v. Hendrie . . . 482
Ryhiner v. Feickert . . 93, 208

Sage v. Chollar . . . 654, 680
v. Woodin . . . 1047
Sager v. Tupper 33, 92, 93, 95, 369, 505

PAGE

Sale v. Dishman . . . 1053
Salmon v. Davis . . . 275
Saloy v. Albrecht . . 230, 680, 683
Salter v. Ham 18, 945
Saltmarsh v. Bower . . 23, 269
Saltsman v. Shults 1096
Sandars v. Ruddle . . . 287
v. Ward 275
Sanderson v. Milton . . . 222
Sandford v. Mickles . . . 412
Sankey v. Columbus Iron Works 17, 20
Sargent v. Collins . . . 93
v. Downey . . . 19. 58
Sauffey v. Howard . . . 236
Saul v. Kruger 467
Saunders v. Bentley . . . 475
v. Duval 991
v. Wilder . . . 660, 665
Sauntry v. Dunlap . 88, 277, 698
Savage v. Carter . . . 681
v. Putman 760
Savery v. Thurston . . . 782
Saylor v. Mockbie . . 295, 1005
Sayre v. Peck 967
Schaeffer v. Fithian . . . 1054
Schalck v. Harmon . . . 661
Scharringhausen v. Luebsen . . 667
Schatzill v. Bolton . . . 689
Schenke v. Dana . . . 775
Schenck v. Long . . . 690
Schermerhorn v. Schermerhorn . 281
Schieffelin v. Stevens . . . 415
Schindler v. Euell . . 33, 441
Schlater v. Winpenny . . 209, 406
Schmertz v. Shrieves . . . 578
Schmidlapp v. Currie . . 655, 1054
Schmidt v. Gunther. . 1093, 1096
Scholefield v. Eichelberger . 78, 231
Schollenberger v. Seldomridge . 56
Schoneman v. Fegley . . . 412
Schulte v. Anderson . . . 973
Schulten v. Lord 383
Schurten v. Davis 406
Schwabacker v. Reddle . 299, 314
Scott's Appeal 760
Scott v. Bandy 236
v. Blood 92
v. Brogart 475
v. Buffom 1045
v. Campbell . . 18, 1026
v. Caruth 1029
v. Colmesnil 18, 348, 405, 451
v. Dansby . . . 284, 1054
v. Lator 978
v. McKinney . . . 643
v. Pinkerton 972
v. Scott 878
v. Searles 945
v. Shepherd . . . 290, 412
v. Trent 275

PAGE

Scott *v.* Tupper 1045
v. Webster 451
Scovill *v.* Kingsley 700
Scranton *v.* Rentfroe 93
Scroggs *v.* Blair 652
v. Cunningham . 220, 788
Scruggs *v.* Russell . . 88, 572
Scudder *v.* Delashmut . . . 1055
Seaman *v.* Johnson . . . 1026
v. Waddington . . . 232
Seawell *v.* Payne 925
Secor *v.* Keller 467
Sedan *v.* Williams . . 451, 683
Seeley *v.* Albrecht 58
v. Schenck 468
Segall *v.* Coney 295
Seibert *v.* Bakewell . . . 383
Seighortner *v.* Weissenborn 223, 227, 1030
Seitz *v.* Buffum 468
Selden *v.* Bank of Commerce 325, 281
Sellers *v.* Streator . . . 506
Sellew *v.* Chrisfield . . . 65, 655
Sells *v.* Hubbell 760
Sergeant *v.* Collins 341
Sewell *v.* Cooper 1029
v. Humphrey . . . 945
Sexton *v.* Sexton 569
Seymour *v.* Butler 433
Shackleford *v.* Shackleford 655, 683, 991
v. Smith 53
Shad *v.* Fuller 994
Shaffer *v.* Snyder 406
Shaler *v.* Trowbridge . . . 811
Shalter *v.* Caldwell . . . 1029
Shamburg *v.* Ruggles . . . 415
Shaphard *v.* Lightfoot . . 475
Sharpe *v.* Johnston . . . 219
Shattuck *v.* Lawson . . . 1029
Shaw *v.* Gaudolfo 18
v. Knowles . . . 1053
v. McDonald . . . 295
v. McGregor . . . 392
v. Pratt 433
Shearer *v.* Payne 945
v. Shearer . . . 1017
Shearman *v.* Hart 857
Shedd *v.* Bank of Battleboro . 1054
v. Wilson 1054
Shed *v.* Bank 477
v. Pierce 433
Sheddell *v.* Messick . . . 977
Sheldon *v.* Smith . . . 266
Shellington *v.* Howland . 130, 136
Shelmire's Appeal . . . 967
Shelton *v.* Cooke 413
Shennefield *v.* Dutton . . . 1027
Shepard *v.* Pratt 20
Shepherd *v.* Boggs . . 860, 945
Sheridan *v.* Medara . . . 33

PAGE

Sherman *v.* Kruel . . . 666
Sherrod *v.* Langdon . . . 47
Sherwood *v.* Marwick . . . 302
v. Snow 269
v. St. Paul, etc., R. R. Co. 652
Shields *v.* Fuller . . 665, 1030
Shirley *v.* Fearne . . . 278
Shoemaker Piano Co. *v.* Bernard 392, 991
Short *v.* Stevenson . . . 580
Shorter *v.* Highlower . . . 392
Shotwell *v.* Miller . . . 433
Shropshire *v.* Shepard . . 20
v. Russell . . . 572
Shurlds *v.* Tilson 415
Shutts *v.* Chaffee 467
Sigel *v.* Chidsey . . 223, 261
Sigler *v.* Knox Co. Bank . . . 655
Sigourney *v.* Munn . . 652, 1015
Sikes *v.* Work . . . 58, 1027
Silverman *v.* Chase . . 266, 369
Silver *v.* Foster 482
v. St. L. Iron Mt. & T. Ry. Co. 961
Simonds *v.* Strong . . . 415
Simonton *v.* Boucher . . . 413
Simmons *v.* Curtis . . . 230
Simpson *v.* Feltz 21
v. Geddes . . . 413
v. Leach . . . 661, 652
Simrall *v.* O'Bannons . . . 268
Sims *v.* McLure 83
v. Smith . . 277, 413
Sinclair *v.* Galland . . . 436
v. Wood 92
Singer *v.* Kelly 383
Singiser's Appeal . . . 1030
Sinklear *v.* Lambert . . 338, 339
Silter *v.* Walker 691
Skannel *v.* Taylor . . 415, 441
Skidmore *v.* Collier . . . 666
Skinner *v.* Bedell . . . 665
v. Dayton . . 246, 751
v. Tucker . . . 220
Skipwith *v.* Lea 666
Slatter *v.* Carroll . . . 1053
Slee *v.* Bloom 376
Slemmir's Appeal . . . 652
Sloan *v.* Moore 266
Slocum *v.* Hooker . . . 483
Sloo *v.* State Bank . . . 474
Smith *v.* Andrews 284
v. Argall 383
v. Baker . . 1054, 1055
v. Black 451
v. Blatchford . . . 469
v. Bodine 20
v. Burnham 88
v. Canfield . . . 468
v. Collins 95
v. Cooper 855

PAGE

Smith v. Danvers . . . 652
v. Edwards 683
v. Emerson 690
v. Evans 661
v. Everett 927
v. Garth 28
v. Gregg 468
v. Griffith 92
v. Hall 287
v. Harvie . . . 216, 417
v. Hazleton 795
v. Hill . . . 47, 190, 417, 540
v. Hollister 90
v. Hoffman 339
v. Hood 387
v. Howard 655
v. Hewlett 95
v. Jackson 652
v. Jones 88
v. Kerr 278
v. Knight 34
v. Loring 783
v. Lowe 1011
v. Ludlow 457
v. Lusher 266
v. Mallory 1054
v. McMicken 689
v. Moynihan 18
v. Mulock 222
v. Perry 20
v. Ramsey 574
v. Riddell . 867, 1025, 1028
v. Sheldon 408
v. Sloan 267
v. Small 18
v. Smith . . . 47, 1026, 1029
v. Stone 278
v. Summerlain 18
v. Tarleton . . . 88, 92, 652
v. Turner 440
v. Vanderburg . . . 23, 406
v. Virgin 1087
v. Walker 664
v. Wilson 59
v. Wight 18, 33
Smyth v. Harvie 308
v. Stradle 329
Snead v. Barringer 338
Sneed v. Kelley 264
Snell v. Atlantic, etc. Co. . . 338
v. DeLand 18
Sniffer v. Sass 1054
Snitzer v. Smith 1054
Snodgrass' Appeal 1055
Snodgrass v. Broadwell . . . 467
Snow v. Howard 482
Snyder v. Lunsford . . . 648, 652
v. Leland 1011
v. May 278
Solomon v. Fitzgerald 1045
v. Solomon . 18, 56, 181, 577

PAGE

Somerby v. Buntin 18
Soule v. Hayward 18
Southard v. Lewis 665
Southern Steam Packet Co. v. McGrath 4
Southern v. Grine 406
Southerland v. Stell 265
South Fork Canal Co. v. Gordon 294
Southwick v. McGovern . . 92, 406
v. Allen 222
Southworth v. Thompson . . . 19
Spalding v. Block 690
Spannhorst v. Link . . . 231, 392
Speake v. Bassett 406
v. Prewitt 467
v. White 412
Spear v. Crawford 98
v. Gillett 337
v. Newell 1029
v. Toland 406
Speer v. Bishop 410
Speauv v. Fox 964
Spiro v. Paxton 689
Sprague v. Ainsworth 275
v. Zunts 268
Sprawles v. Barnes 665
Springer v. Cabell 1029
v. Shirley 441
Sproat v. Crowley . . 1029, 1030
v. Porter 57
Staats v. Bristow 689
v. Howlett 348, 861
Stafford v. Fargo 611
v. Gold 665
Stahl v. Stahl 1053
Stainer v. Tyson 329
Stalhert v. Knox 1029
Stall v. Cassady 415
v. Catskill Bank 266
Stammers v. McNaughten . . . 945
Stanchfield v. Palmer 17
Stanhope v. Suplee 1045
Stanley v. Stark 304
Stannard v. Smith 339
Stanton v. Buckner 1029
v. Lewis 220
Stanwood v. Owen 1060
Stapleton v. King 18
Stark v. Carey 269
v. Nobb 857
State, etc., Bank v. Thompson . 266
State v. Baldwin 967
v. Quick 290
v. Thomas 655
v. Wiggin 93
St. Armand v. Long 23
St. Clair v. Smith 972
St. John v. Holmes 474
Stearns v. Burnham 408
v. Haven 18, 47
v. Houghton 412

	PAGE
Stea *v.* Matthews	50
Stebbins *v.* Harmon	958
Steele *v.* First Nat. Bank	599
Steere *v.* Hoagland	993
Stein *v.* Ladow	266
v. Robertson	80, 676
Stell *v.* Jennings	269
Stenbury *v.* Callanan	392
Stephens *v.* Orman	969
Stephenson *v.* Cornell	53
Sterling *v.* Brightbill	652
Stettauer *v.* Carney	19
Stevens *v.* Faucet	18, 299
v. Bank of Cent. N. Y.	1055
v. Orman	570
v. Lunt	467
v. Parkhurst	475
v. Stevens	1015
v. Yeatman	220, 973
Stevenson *v.* Mathers	945
Stewart *v.* Bukholter	945
v. Caldwell	267, 416
v. McKickan	991
v. Rogers	436
v. Slater	655
v. Sonneborn	415
Stidger *v.* Reynolds	838
Stiernerman *v.* Cowing	412
Stiles *v.* Myer	386
Stillwell *v.* Gray	337
Stittheimer *v.* Killip	969
Stitt *v.* Cass	433
St. Nicholas Bank *v.* Savery	266
Stoallings *v.* Baker	19
Stockdale *v.* Ullery	994
Stockton *v.* Frey	299
Stockwell *v.* Dillingham	294
Stoddard *v.* Wood	1028
Stokes *v.* Stevens	515
Stone *v.* Chamberlain	448
v. Fouse	1026
v. Gt. Western Oil Co.	151
v. Manning	683
Storer *v.* Hinkley	266, 275, 1053
Story *v.* Barrell	264
Stoughton *v.* Lynch	572, 652, 837
Stout *v.* Fortner	878
v. Seabrook	902, 963
Strader *v.* White	33, 34
Straffin *v.* Newell	278
Strange *v.* Graham	666, 680
Strong *v.* Baker	991
v. Clawson	9
v. Fish	277
v. Hines	475
v. Niles	369
v. Place	19
Stroud *v.* Stroud	652
Struthers *v.* Pearce	574
Sturges *v.* Swift	1028
Succession of Andrews	1014
Succession of Auck	290
Beer	1054
Bofenschen	210
Dolhoude	239, 1029
Powell	1029
Wilder	1045
Sullivan *v.* Campbell	1084
Summey *v.* Patton	652
Surtell *v.* Brailsford	84
Sutcliffe *v.* Dohrman	689
Sutton *v.* Dillaye	412
v. Irwine	281
v. Mandeville	991
Swaile *v.* Coverdill	468
Swann *v.* Steadman	278
Sweetser *v.* French	281
Sweet *v.* Bradley	294
v. Reed	689
Swift *v.* Dean	574
Sylverstein *v.* Atkinson	266
v. Smith	339, 467
Tabb *v.* Gist	239, 406, 697
Taft *v.* Buffum	230
v. Schwamb	652, 661, 676
v. Warde	93, 1092
Taggart *v.* Phelps	406
Talbot *v.* Pierce	680
Tallmadge *v.* Penoyer	311
Tams *v.* Hitner	47
Tanner *v.* Hall	266
Tapley *v.* Butterfield	266, 278, 284
Tappan *v.* Bailey	1083
v. Blaisdell	1055
Tapping *v.* Paddock	787
Tarbell *v.* Page	151
Tarlton *v.* Herbert	468
Tassey *v.* Church	264, 470, 516
Tate *v.* Clemments	456
Taunton Iron Co. *v.* Richmond	413
Taylor *v.* Bass	506
v. Bemis	1015
v. Castle	231, 1086
v. Cawthorne	227
v. Coffing	807
v. Coryell	265
v. Hancock	376
v. Henderson	95, 482
v. Herring	991
v. Hillyer	329, 418
v. Hill	408
v. Hutchinson	977
v. Jones	299
v. Penny	697
v. Rosch	383
v. Sotolingo	20
v. Smith	1030
v. Taylor	290, 676
v. Terme	33, 34
v. Webster	92, 383

PAGE

Taylor v. Young . . . 456, 788
Tay v. Ladd 295
v. Davidson 47
Teller v. Patten 95
v. Wetherell 665
Tenney v. Foote 302
v. Johnson 655
v. N. E. Protective Union 1083
Terrell v. Goddard 1011
v. Jones 787
v. Richards 90
Terry v. Berry 652
v. Carter 1025
Terrwilliger v. Telegraph Co . 115
Thayer v. Barney 572
v. Lane 652
The Crusader 19
Julia 79
Rapid 78
San Jose 78
Swallow 33
Themot v. Michael 652
Thomas v. Green 47
v. Miles 857
v. Moore 93, 97
v. Pennich 277
v. Wolcott 95
Thompson v. Bowman 652
v. Candor 151
v. Egbert 652
v. Frist 689
v. Howard 239
v. Lewis 689
v. Mylin 611, 817
v. Tennin 655
Thomson v. Thomson 667
Thornton v. Bussey 1054
v. Kerr 95
Thorn v. Smith 264
Theall v. Lacey 809
v. Steward 276
Thurber v. Corbin 440
v. Jenkins 440
Thurston v. Horton 61
v. Loyd 266
v. Perkins 406
Tibbatts v. Tibbatts 21
Tibbetts v. Blood . . . 1093, 1094
Tick v. Mulholland 264
Tidd v. Rives 652
Tiffany v. Crawford 1058
v. Williams 1094
Tilford v. Ramsey . . . 266, 344
Tillier v. Whitehead . . 266, 333
Tillinghast v. Champlin . . 655
Tillottson v. Tillottson . . . 1045
Tindal v. Bright 470
Tipton v. Nance 1028
Titus v. Todd 440
Tobey v. McFarlin 689
v. Wood 82

PAGE

Tobias v. Blin 19
Todd v. Lorah 277
v. Rafferty . . . 572, 963
Tolford v. Tolford 1029
Tolman v. Henrohen 346
Tombigbee Bank v. Dumell . 412
Tomlinson v. Burk 468
v. Hammond 698
v. Ward . . . 569, 783, 1015
Tomlin v. Goldsmith . . . 92, 97
Tompkins v. Woryard . . . 329
Tone v. Goodrich 665
Toof v. Duncan 236
Toombs v. Hill 1054
Topliff v. Jackson 867
v. Vail 1054
Topping v. Paddock 611
Torrey v. Twombley 1029
Tournade v. Hagedorn . . . 383
v. Methfessel 383
Towle v. Meserve 1029
v. Pierce 945
Towne v. Hendee 239
v. Leach 689
Townsend v. Stevenson . . . 440
v. Goewey 1083
Travens v. Crane 209
Travis v. Tobias 467
Treadwell v. Brown 1054
v. Williams 652
v. Wells 416
Tredwell v. Roscoe 690
Trimble v. Coons 278
Trowbridge v. Scudder 376
Troy, etc., Factory v. Corning . 1025
Trott v. Irish 467, 1085
Troy Iron & Nail Factory v. Winslow 665
Truesdell v. Baker 222
Truitt v. Baird 1026
Trump v. Baltzell . . . 698, 774
Tucker v. Peaslee . . . 338, 1029
Tudarman v. Newhall 433
Tudor v. White 415
Turbeville v. Ryan 278
Turk v. Nicholson 417
Turnbow v. Broach 440
Turner v. Bissell 17, 34
v. Jaycox 655
v. McIlhaney 92
v. Ross 457
v. Smith 691
Turnipseed v. Good 227
v. Goodwin 676
Tuttle v. Cooper 483
v. Eskridge 337
Tutt v. Adams 266
v. Land 786, 791
Tyler v. Scott 19
Tyner v. Stoops 440
Tyng v. Thayer 972, 977

	PAGE
Tyrrell *v.* Washburne	98
Uhler *v.* Browning	329
v. Semple	652, 682
Ulerg *v.* Ginrich	267
Umberger *v.* Plumb	452
Union Bank *v.* Day	269
v. Eaton	329
v. Hall	412
Union, etc., Bank *v.* Underhill	266
Union Nat'l Bank *v.* Bank of Commerce	1028
United States Bank *v.* Binney	991
United States *v.* Duncan	1054
v. Williams	690
Updike *v.* Doyle	392, 948
Updegraff *v.* Rowland	655
Upham *v.* Hewitt	33
Upson *v.* Arnold	654, 655
Upton *v.* Tribilcock	100
U. S. B'k. *v.* Binney	266, 342, 823
U. S. Express Co. *v.* Bedbury	468
U. S. *v.* Thompson	433
Utley *v.* Smith	776
Vaccaro *v.* Toof	408
Vallandingham *v.* Duval	482
Vallett *v.* Parker	266
Vanalstyne *v.* Cook	383
Van Bront *v.* Applegate	652, 689
v. Mather	266
Vance *v.* Blair	1025
v. Campbell	295
v. Cowing	1053
v. Funk	95
Vandenhewvil *v.* Storrs	666
Vanderburgh *v.* Hull	19
Van Densen *v.* Blum	337
Vandike's Appeal	689, 1055
Van Dike *v.* Rossbram	383
Van Doren *v.* Horton	412
Vanduzer *v.* McMillan	774
Van Dyke *v.* Jackson	861
Van Eps *v.* Dillaye	482
Van Ingan *v.* Whitman	383
Van Keuren *v.* Parmalee	456
v. Trenton	995
Vanness *v.* Dubois	760
Van Ness *v.* Fisher	223, 832
v. Forest	1026
v. Van Ness	809
Vannoy *v.* Jones	599
Van Scoter *v.* Lefferts	295
Van Slyck *v.* Skinner	652
Vansyckle *v.* Rorback	80
Van Valen *v.* Russell	516
Van Valkenberg *v.* Bradley	402
Van Rennsalaer *v.* Emery	1010
Van Rossum *v.* Walker	10
Van Wagner *v.* Chapman	1054
Varnell *v.* Anderson	440
Vassar *v.* Camp	19
Venable *v.* Levick	236, 291
Vernon *v.* Manhattan	415
v. Vernon	1045
Vienne *v.* Harris	236
Villa *v.* Jones	376, 92
Vinal *v.* Burrill	412
Voorhees *v.* Childs	665, 1053
v. Jones	20
Vosper *v.* Kramer	683
Vreeland *v.* N. J. Stone Co.	100
Wabrath *v.* Viley	47
Wade *v.* Rusher	682, 680, 879
Wadley *v.* Jones	954, 972, 1027
Wadsworth *v.* Manning	19, 1026
Wagner *v.* Clay	329
v. Fresche	269
v. Simmons	267
v. Wagner	967
Waggoner *v.* Gray	878
Wait *v.* Brewster	410, 416
Waite *v.* Dodge	23, 467
v. Foster	412
Walcott *v.* Carfield	239
Walden *v.* Sherburne	264
Waldo Bank *v.* Greeley	266
v. Lambert	266
Waldron *v.* Simmons	1053
Walkenshaw *v.* Perzel	383, 881
Walker *v.* Clark	475
v. Galbrath	665
v. Ogden	1087
v. Goodrich	216, 417
v. House	1045
v. McCulloch	433
v. Trott	994
v. Wait	231, 1030
Wallace *v.* Berger	95
v. Fitzsimmons	665
v. Hull	1029
v. Robinson	945
v. Rippon	84
v. Yeager	295
Waller *v.* Keyes	266
v. Thomas	1094
Wall *v.* Balcom	18
Walmsley *v.* Mendelsohn	945
Walpole *v.* Renfroe	783
Walsh *v.* Adams	690
v. Cane	456
Walton *v.* Tosten	278
Walworth *v.* Henderson	266
Wamsley *v.* Lindenberger	483
Warbritton *v.* Cameron	1025
Warder *v.* Hewdigate	505
Wardwell *v.* Haight	415
Ward *v.* Barber	412, 473

PAGE

Ward v. Brigham 218
v. Bodeman 66
v. Gaunt 58
v. Howell . . . 413, 457
v. Leeviston 467
v. Motter 451
v. Newell 383
v. Tylor 412
v. Woodburn 655
Ware v. Owens 652
Waring v. Robinson 474
v. Waring 1014
Warner v. Griswold . . . 190, 216
Warren v. Ball 405
v. Dickson 1027
v. French 329
v. Taylor 680, 683
v. Wallace 655
v. Wallis 689
v. Warren 878
v. Wheelock 972
Washburn v. Bank of Bellows Falls 1054
v. Washburn 572
v. Goodman 369
Waterbury v. Express Co. 222, 598, 1006, 1098, 1090
Waterman v. Dutton 262
v. Hunt 1054
Watkinson v. Bank of Pennsylvania 415
Watson v. Fletcher . . 652, 772
v. Owens 451
Watt v. Kirby . . . 338, 339
Waugh v. Mitchell . . . 485, 665
Way v. Fravel 482
Weaver v. Ashcroft 655
v. Jacksonville, etc., R. R. Co. 105
v. Tapscott 337
v. Upton 774
v. Weaver 1054
Webb v. Hellon 879
v. Leggett 20
Weddle v. Stone 1045
Weed v. Richardson 329
Wehrman v. Reakirt 136
Weld v. Peters 652
Welker v. Wallace 311
Welles v. March . . . 236, 266
Welsh v. Speakman 95
Wells v. Carpenter 1025
v. Evans 266, 278
v. Erstein 967
v. Gates 1083, 1084, 1089, 1092
v. Mitchell 295
v. Strange 878, 995
v. Turner 236
v. Wilson 255, 700
Welt v. Bird 1029
Wentworth v. Raigvel . . . 311, 1032
Werner v. Leisen 227
Wescott v. Fargo 1096
v. Price 1029

PAGE

Wescott v. Tyson 574
Westerlo v. Evertson 1029
Western Stage Co. v. Walker 412, 598
Weston v. Ketchum . 569, 574
Westphal v. Henney 878
West Point Fdy. Association v. Brown 4, 1092
West v. Chosten 683
v. Hickory Mining Ass. . 652
Wetler v Shleeper 266
Weyer v. Thornburgh 1053
Whaley v. Moody 266
Wharton v. Woodburn 269
Wheatley v. Calhoun . . 574, 652
v. Tutt 473
Wheat v. Hamilton 392
Wheeler v. Arnold 1027
v. Bullard 482
v. Farrar 19
v. Price 329
v. Sage 572
Whigham's Appeal 698
Whillden v. Bullock 383
Whipple v. Hill 1054
v. Parker 4
Whitcomb v. Converse 807
Whitebill v. 1025
Whitehall v. Shickle . . . 20, 1025
Whitehead v. Bank of Pittsburg 412
v. Chadwell 1054
White Mountain Bank v. West 654
White v. Brownell . 1094, 1095
v. Colfax 680
v. Dougherty 1054
v. Fitzgerald 18
v. Gibson 291
v. Hackett . . . 384, 1054
v. Harlow 1029
v. Jones . . . 467, 855, 995
v. Kearney . . . 236, 412
v. Murphy 415
v. Parish 655, 1055
v. Savery 467
v. Smith 373
v. Tudor 412, 482
v. Union Ins. Co. . 413, 1054
v. Waid 1030
v. Ward 690
v. White 945, 947
Whitewright v. Stimpson . . 383
v. Collier 1025
Whitesides v. Lafferty . . . 572
v. Lee 406
Whiting v Faranet 417
Whitlock v. McKechnie 208
Whitman v. Keith 1093
v. Leonard 208, 228, 406, 408
v. Porter 19, 770
v. Robinson 1008
Whitmore v. Adams . . . 329, 867
v. Shiverick . . . 666, 680

	PAGE
Whittimore v. Elliott	483
Whitney v. Ludington	33
v. Sterling	95
Whittaker v. Brown	266, 269
Whitton v. Smith	295
Whitwell v. Warner	423
Whitworth v. Ballard	408
Whitney v. Cotton	652
Wickham v. Davis	691
Wickliffe v. Earl	878
Widdifield v. Widdifield	92
Wieman v. Anderson	84
Wiggin v. Cumings	1030
v. Goodwin	1029
v. Tudor	433
Wilby v. Phinney	1027
Wilcox v. Kellogg	655
v. Wilcox	652
Wildes v. Fessenden	436
Wilde v. Jenkins	448
v. Keeler	1054
Wilder v. Knox	412
v. Weakley	83
Wiley v. Allen	277
Wilkerson v. Allen	652
Wilkinson v. Griswold	417
v. Jett	20
v. Yale	655
Wilkins v. Davis	224
v. Pearce	281
Willes v. March	266
Willett v. Stringer	284, 311
Willey v. Carter	652
Williamson v. Fontain	652
v. Fox	416
v. Haycock	945
v. McGinnis	433
v. Monroe	1012
v. Wilson	224, 231, 1011
Williams v. Bank of Michigan	1083, 1084
v. Barnett	295
v. Birch	415
v. Bowers	415
v. Bremhall	277
v. Gage	655, 690, 1055
v. Gilchrist	369
v. Gillies	33, 88, 337
v. Henshaw	1027
v. Hodgson	278
v. Love	680, 682
v. Moore	652
v. Nicholson	879
v. Rayers	369
v. Roberts	295
v. Rogers	451, 482
v. Soutter	93
v. Wallbridge	266, 329
v. Wilson	860
Willings v. Consequa	433
Willis v. Freeman	1054
v. Hill	337

	PAGE
Willson v. Nicholson	1045
Wilson v. Bowden	655
v. Cobb	18
v. Colman	92, 97
v. Conine	1054, 1055
v. Dargan	277
v. Ficher	1011
v. Horder	266
v. Hunter	278
v. Home	369
v. Jennings	451
v. Lovelace	92
v. McConnell	1054
v. Nicholson	665
v. Owen	1086
v. Soper	665, 666, 8 5
v. Stewart	404
v. Stillwell	867
v. Strobach	689, 690
v. Torbet	413
v. Wallace	467
v. Williams	329
v. Wilson	190
Wills v. Simmons	18, 1025, 10 6
Wimpee v. Mitchell	1053
Windham Bank v. Kendall	263
Winship v. United States Bank	18, 21, 275, 238
Winslow v. Chiffele	93, 652
Wintersmith v. Pointer	1054
Wise v. Copley	505
Wisham v. Lippincott	1054
Witcher v. Brewster	299
Witherhead v. Allen	1095, 1096
Withers v. Withers	837
Witram v. Van Wormer	267
Witter v. McNeill	340
v. Richards	1054
Wooddrop v. Ward	1054
Wolbert v. Harris	1012
Wolfe v. Gilmer	676
Wolff v. Shelton	973
Wolf v. Mills	302
Wolle v. Brown	264
Woodbury v. Sackrider	287
Woodford v. Dorwin	412
Woodruff v. King	278, 284, 406
Wood v. Beatt	19
v. Connell	264
v. Cullen	49
v. Erie Railway Co.	210
v. Fox	967
v. Gault	222
v. Goss	293
v. Johnson	698
v. Merrow	7012
v. Montgomery	652
v. O'Kelley	467
v. Pennell	47
v. Quarles	95
v. Shepherd	265, 266

	PAGE
Wood *v.* Vallette	17, 21, 33
v. Wilder	78
v. Wood	275, 1047
Woodward's Case	190
Woodward *v.* Cowing	58
v. Francis	991
v. Horst	277
v. Newhall	483
v. Downer	412
Woodworth *v.* Downer	412
Worrall *v.* Judson	136
Wright *v.* Ames	236
v. Brosseau	392
v. Cumptsy	1027
v. Eastman	1026
v. Harris	475
v. Herrick	1054
v. Hooker	208, 344
v. Jacobs	1029
v. Michie	1025
v. Powell	50
v. Storrs	665
v. Troop	774
v. Williamson	467
Wycoff *v.* Purnell	1027
Wyman *v.* Chicago, etc., R. R. Co.	47

	PAGE
YANCEY *v.* Marriott	95
Yale *v.* Eames	412
v. Yale	295
Yandes *v.* Lefavour	275, 413, 456
Yates *v.* Watson	482
Yeager *v.* Wallace	598
Yeatman *v.* Woods	652
Yocum *v.* Benson	38
Yoke *v.* Barnet	808, 98.
Yonger *v.* Skinner	83
York hire Bank *v.* Beatson	266
York *v.* Clemens	92
Young *v.* Brick	1029
v. Clute	807
v. Pearson	954
v. Smith	53
v. Stevens	83
v. Tibbitts	415
ZALLAR *v.* Janvrin	415
Zane *v.* Thomas	198
Zimmerman *v.* Erhard	208
v. Huber	774, 775
Zuel *v.* Bowen	266

ENGLISH STATUTES REFERRED TO.

[The references are to the marginal pages.]

	PAGE
33 Hen. 8, c. 27	608
21 Jac. 1. c. 16	453
§ 3	453, 454, 459, 963
7	454
29 Car. 2, c. 3	
§ 4	87, 358, 674
17	358
4 & 5 Ann. c. 16	453
§ 17	453
19	454
27	64, 65
6 Ann. c. 16	187
6 Geo. 1, c. 18	6, 187
§ 18	192
2 Geo. 2, c. 22	503
7 Geo. 2, c. 8	710
8 Geo. 2, c. 24	503
10 Geo. 2, c. 28	191
22 Geo. c. 46	
§ 11	190
25 Geo. 2, c. 36	191
28 Geo. 2, c. 19	191
21 & 22 Geo. 3, c. 46 (Irish)	13
25 Geo. 3, c. 80	
§ 7	190
37	190
25 Geo. 3, c. 90	
§ 30	190
28 Geo. 3, c. 19	190
28 Geo. 3, c. 30	190
39 & 40 Geo. 3, c. 28, § 15	185
39 & 40 Geo. 3, c. 98	
§ 23	189
55 Geo. 3, c. 104	189
57 Geo. 3, c. 60	187
4 Geo. 4, c. 76	
§ 16	825
4 Geo. 4, c. 94	
§§ 132, 133	184
5 Geo. 4, c. 114	6
§ 1	187

	PAGE
6 Geo. 4, c. 14	
§ 6	315
6 Geo. 4, c. 42	
§ 10	186
6 Geo. 4, c. 81	
§ 7	184
6 Geo. 4, c. 91	6, 7, 192
§ 2	6, 152, 383
6 Geo. 4, c. 94	285
6 Geo. 4, c. 133	189
See, in Index, Companies governed by	
7 Geo. 4, c. 46	161, 185
§ 4	161, 500, 522, 531
5	161, 162
6	161
11	383
12	383
13	383, 462, 531
14	782
9 Geo. 4, c. 14	
§ 1	456, 458
6	282
8	458
9 Geo. 4, c. 23	185
11 Geo. 4 & 1 Wm. 4, c. 68	
§§ 5, 6	484
1 Will. 4, c. 66	123
3 & 4 Wm. 4, c. 27	453
§ 16	454
28	453
40	453
41	453
42	453
3 & 4 Wm. 4, c. 42	453, 454
§ 2	1051
3	453, 459
4	454
8	482
3 & 4 Wm. 4, c. 98	11, 185
§ 2	185

PAGE

4 & 5 Wm. 4, c. 94 . . 7, 152, 383
5 & 6 Wm. 4, c. 76
§ 102 . . . 190
7 Wm. 4 & 1 Vict. c. 73 7, 11, 356, 383, 452
See, in the Index, Companies governed by 7 Wm. 4 & 1 Vict. c. 73
§ 2 153
7 Wm. 4 & 1 Vict. c. 73
§ 3 . . . . 153, 500
4 . . . . . 153, 383
5 153
6 . 86, 153, 522, 536
7 153
8 153
9 153
10 . . . . 86, 153
13 . . . . . 153, 500
17 153
18 153
20 . . . . 153, 798
21 . . . 153, 461, 536
22 500
23 500
24 . 394, 462, 500, 536
25 500
26 153
27 153
29 383
32 152
1 & 2 Vict. c. 96 . . . . 11, 497
§ 4 686
1 & 2 Vict. c. 106
§§ 29, 31 77
1 & 2 Vict. c. 110 . . . . 9, 11
§ 14 . . 10, 14, 694
15 694
16 . . . 694, 695
2 & 3 Vict. c. 68 11
3 & 4 Vict. c. 11 497
3 & 4 Vict. c. 82 . . . . 11, 694
3 & 4 Vict. c. 111 11
4 Vict. c. 14 . . . . . 11, 77
5 Vict. c. 5 11
§ 4 . . . 10, 697, 798
5 & 6 Vict. c. 39 285
5 & 6 Vict. c. 85 11
6 & 7 Vict. c. 46 191
6 & 7 Vict. c. 68 191
6 & 7 Vict. c. 73 190
§ 2 190
26 190
32 190
7 & 8 Vict. c. 32 11
§ 1 184
8 184
9 185
10 185
11 185
23 185

PAGE

7 & 8 Vict. c. 32
§ 26 185
29 184
7 & 8 Vict. c. 85
§ 19 270
7 & 8 Vict. c. 110 8
See, in the Index, Companies governed by 7 & 8 Vict. c. 110
7 & 8 Vict. c. 110
§ 3 . . . . 86, 125
7 86
23 397
25 . . . . 385, 397
29 . . . 357, 553, 762
30 561
44 356
45 356
46 356
50 86
54 704
66 462
67 782
7 & 8 Vict. c. 111 9
7 & 8 Vict. c. 113 . . . . . 8, 11
See, in the Index, Companies governed by 7 & 8 Vict. c. 113
§ 1 . . . . 161, 186
5 626
7 385
10 462
14 782
22 356
23 704
31 628
37 746
8 & 9 Vict. c. 16
See, in the Index, Companies governed by 8 & 9 Vict. c. 16
§ 2 156
3 . . . . 156, 1050
6 155
7 672
8 . . 156, 533, 799
9 . . 155, 522, 558
10 . . 156, 522, 558
11 156
12 156
14 . . 161, 704, 1050
16 . . . . 686, 703
18 1050
19 1050
20 . . . 798, 1050
21 . . 616, 634, 640
22 . . 616, 624, 634
23 . . . . 616, 629
24 617
25 629
26 . . 639, 1033

	PAGE
8 & 9 Vict. c. 16	
§ 27	639, 1033
28	156, 1033
29	538, 616, 639, 746
30	746
31	558, 746
32	558, 746
33	746
34	746
35	746
36	156, 383, 462, 522, 538
37	782
38 *et seq.*	270, 286, 557, 617
45	558
48	798
56–58	617
61–64	617
63	558
65	395, 617
66	556
67	556
68	556
69	556
70	556
71	556
72	556
73	556
74	556
75	557
76	557
77	557
78	557
79	557
80	557
81–100	552
83	553, 557
84	553
85	553
86	553
87	553
88	553
89	553, 557
90	554, 557, 624
91	554, 557, 798
92	554
93	554
94	555
95	357
96	555
97	357, 359, 555
98	555
99	555
100	555
101	557, 811
102–108	811
104	557
109	555, 811
110	555, 811
111	555, 811
112	555, 811

	PAGE
8 & 9 Vict. c. 16	
§ 113	555, 811
114	811
116	811
117	558, 811
118	811
119	558, 811
120	797, 799
121	629, 798, 799
122	799
123	799
124	557
128	134
136	633
138	556
161	558
Sched. B.	161
8 & 9 Vict. c. 76	11
8 & 9 Vict. c. 109	
§ 18	710
9 & 10 Vict. c. 28	9
10 Vict. c. 75	166
11 & 12 Vict. c. 45	9
§ 50	493
12 & 13 Vict. c. 108	9
13 & 14 Vict. c. 60	
§ 2	663
13 & 14 Vict. c. 83	9, 11
14 & 15 Vict. c. 99	
§ 12	93
15 & 16 Vict. c. 80	
§ 42	993
15 & 16 Vict. c. 83	
§ 36	189
15 & 16 Vict. c. 86	
§ 54	992
16 & 17 Vict. c. 70	
§ 123	226
141	704
142	704
16 & 17 Vict. c. 113	
§ 20	459
24	458
26	453
27	458
17 & 18 Vict. c. 25	495, 539, 497
17 & 18 Vict. c. 104	
§ 18	78, 644
37	644
43	644
17 & 18 Vict. c. 125	
§ 11	868
61	516
68	519, 520, 1036
18 & 19 Vict. c. 32	166
18 & 19 Vict. c. 133	8
See, in the Index, Companies governed by the Acts of 1856-8	
§ 19	126, 179
20	179

	PAGE
18 & 19 Vict. c. 133	
§ 41	356, 359
62	462
Table B.	126, 179
19 & 20 Vict. c. 97	453
§ 4	213, 214
9	453, 454, 963
10	454
11	450, 454
12	454
13	458
14	458, 459, 1053
20 & 21 Vict. c. 14	
§ 3	196
26–27	165
20 & 21 Vict. c. 49	11
§ 4	166, 187
5	166, 187, 196
20 & 21 Vict. c. 75	
§ 21	84
20 & 21 Vict. c. 85	
§§ 25, 26	84
21 & 22 Vict. c. 90	
§§ 32 & 40	188
21 & 22 Vict c. 108	
§§ 6 & 10	84
22 & 23 Vict. c. 59	265
23 & 24 Vict. c. 28	710
23 & 24 Vict. c. 38	
§ 11	662
23 & 24 Vict. c. 125	
§ 20	357
23 & 24 Vict. c. 126	
§ 20	509
33	519
23 & 24 Vict. c. 145	
§ 30	1069
24 & 25 Vict. c. 96	816
§ 75	814
81–84	14
81–86	11
82	324, 814
83	324, 814
84	324, 814
85	324, 814
24 & 25 Vict. c. 98	
§ 23	123
25 & 26 Vict. c. 63	
§ 3	644
25 & 26 Vict. c. 87	9, 495
25 & 26 Vict. c. 89	
The Companies act, 1862. See the act in the Appendix, and see the Index, No. 1, and also see "Companies governed by the act of 1862" in Index.	
26 & 27 Vict. c. 92	
§ 43	494
26 & 27 Vict. c. 118	10, 11, 155, 617, 737
§ 4	747
26 & 27 Vict. c. 118	
§ 6–8	747
9	737
10	747
11	747
14	797
21	616
22	270, 286
23–35	270, 286
Part III.	275
27 & 28 Vict. c. 19	360
27 & 28 Vict. c. 32	497
27 & 28 Vict. c. 121	
§ 3 *et seq.*	395, 617
28 & 29 Vict. c. 78	286
§ 3	558
6–11	563
21	563
23	563
27	563
31–33	563
28 & 29 Vict. c. 86	10, 11, 20, 25, 26, 43 *et seq.*
29 & 30 Vict. c. 108	270, 812
30 Vict. c. 23	
§ 7	87, 188
30 Vict. c. 29	11, 712
§ 1	711
7	87
30 & 31 Vict. c. 47	11
30 & 31 Vict. c. 127	11
§ 4	518
27	617
30	811
31 & 32 Vict. c. 40	63, 65
31 & 32 Vict. c. 68	11
31 & 32 Vict. c. 116	11, 873
32 and 33 Vict. c. 19	11, 146, 150, 875
§ 9	147, 148
10	624, 632
11	627
12	615, 629
13	148, 495, 1033
14	149, 687
15	149
16	746, 911
16–23	147
21–23	738
24	658
25	147
35	149, 701
36	658
32 & 33 Vict. c. 46	640
32 & 33 Vict. c. 48	10, 11, 155, 275, 617
§ 1	270, 286
5	617
6	617
7	617
32 & 33 Vict. c. 62	
§ 4	695
32 & 33 Vict. c. 71	11
§ 23	641

PAGE

32 & 33 Vict. c. 71
§ 31 641
50 418
80 494
112 491
32 & 33 Vict. c. 96
§ 14 687
32 & 33 Vict. c. 114 11
33 Vict. c. 14 78
33 & 34 Vict. c. 20 . . . 286
§ 3 *et seq.* . . . 563
33 & 34 Vict. c. 23 . 78, 80, 661
33 & 34 Vict. c. 35
§ 2 . . 1081
5 . . 14, 1081
33 & 34 Vict. c. 61 12, 293, 814
33 & 34 Vict. c. 93
§ 4 . . 85
10 . . . 84
33 & 34 Vict. c. 97
§ 3 102, 123, 549
69 . . 711
102, pl. 1 549
pl. 3 . 549
Sch. Title Conveyance 705
33 & 34 Vict. c. 99 . . 190
33 & 34 Vict. c. 104 . . . 11
34 Vict. c. 4 . . 549
34 & 35 Vict. c. 31
§ 5 . . . 166
34 & 35 Vict. c. 58 . 12, 293, 814
35 & 36 Vict. c. 41 . 12, 816
§ 7 464
36 & 37 Vict. c. 66 [Judicature Act 1873]
§ 24 . 455, 507, 768
25 . . 507, 768
26 cl. 6 . . . 487
37 & 38 Vict. c. 62, § 2 . . . 82
c. 96 . . 11, 185
38 & 39 Vict. c. 31 . . 11, 518
38 & 39 Vict. c. 77 [Judicature Act 1875]
§ 10 . . 1058

PAGE

38 & 38 Vict. c. 77 [Judicature Act 1875.]
§ 10 cl. 2 . . . 455
cl. 11 455
Order 9
r. 6 . . 468, 475
Order 12
r. 12 . . 475
Order 16
r. 1, 567, 482, 484, 490. 507
r. 3 467, 482, 490, 507
r. 5 468, 482, 490, 507
r. 6 . . . 1045
r. 7 490
r. 9 . . 468, 501
r. 10 . 468, 501
r. 13 467, 476, 477. 480, 509
r. 17 . . . 1068
r. 17 *et seq* 468, 487
r. 18 . 487
Order 17 . . 1068
r. 6 . . 468, 480
r. 7 468
Order 19
r. 3 . . 503, 1010
r. 13 . . . 467, 482
Order 31
r. 1 495
r. 4 495
r. 8 . 962, 1069
Order 36
r. 3 . . 962
Order 42
r. 8 515, 516
Order 52
r. 4 . . . 1010
Order 58
40 & 41 Vict. c. 26 [The Company's Act, 1877]
§ 3 620
§ 4 . . . 620
§ 5 619

LAW OF PARTNERSHIP,

ETC.

INTRODUCTORY.

1. *Meaning of the word partnership.*

To frame a definition of any legal term which shall be both positively and negatively accurate, is possible only to those who having legislative authority, can adapt the law to their own definition. Other persons have to take the law as they find it; and rarely indeed is it in their power to frame any definition to which exception may not justly be taken. All that they can usefully attempt is to analyze the meanings of the words they use, and to take care not to employ the same word in different senses, where so to do can possibly lead to confusion. Partnerships.

Without attempting, then, to define the terms partners and partnership, it will suffice to point out as accurately as possible the leading ideas involved in those words. The terms in question are evidently derived from *to part*, in the sense of to divide amongst, or share, and this at once limits their application, although not very precisely: for persons may share almost anything imaginable, and may do so either by agreement amongst themselves or otherwise. But in order that persons may be partners in the legal acceptation of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement *is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term. *2

By some writers indeed associations which have not gain for

their object are occasionally termed partnerships; and even in the Companies act, 1862, partnerships having gain for their object are referred to, and the reader is thereby led to suppose that there may be partnerships of some other kind. (*a*) But to use the word partnership to denote a society not formed for gain is to destroy the value of the word, and can lead only to confusion. Nor is it consistent with modern usage. Lord Hale and older writers use co-partnership in the sense of co-ownership, but this is no longer customary; and as will be shown hereafter, there are many important differences between the two. (*b*)

Although for the reasons already stated the writer has not attempted to give a definition of the term partnership, he appends for the consideration of the reader the following definitions taken from works of celebrity:[1]

Civil Code of New York.

Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them. (*c*)

Code civil.

La société est un contrat, par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun, dans la vue de partager le bénéfice qui pourra en résulter. (*d*)

Collyer.

[Partnership as between the parties themselves is a voluntary contract between two or more persons for joining together their money, goods, labor, and skill, or any or all of them, under an understanding that there shall be a communion of profit between them, and for the purpose of carrying on a legal trade, business, or adventure.] [2]

Dixon.

A partnership is a voluntary unincorporated association of individuals standing to one another in the relation of principals for carrying out a joint operation or undertaking for the purpose of a joint profit. (*e*)

Domat.

La société est une convention entre deux ou plusieurs personnes, par laquelle ils mettent en commun entre eux ou tous leurs biens ou une partie, ou quelque commerce, quelque ouvrage, ou quelque autre affaire, pour partager tous ce qu'ils pourront avoir de gain ou souffrir de perte de ce qu'ils auront mis en société. (*f*)

Kent.

Partnership is a contract of two or more competent persons to place their money, effects, labour, and skill, or some or all of them, in lawful commerce, or business, and to divide the profit and bear the loss in certain proportions. (*g*)

(*a*) See sec. 4 of the act.

(*b*) See *infra*, chap. 1, § 6.

(*c*) Civil Code of the State of New York, § 1283.

(*d*) Code Civil, § 1832.

[1] In Chapman *v.* Devereux, 32 Vt. 616, partnership is defined to be a joint interest in the net profits of an adventure or business, or in the profits as affected by the losses.

[2] Substantially adopted in Tyler on Part. p. 11.

(*e*) Dixon's Law of Partnership, 1.

(*f*) Domat, les Lois Civiles, liv. i. tit. 8, § 1.

(*g*) 3 Kent's Comm. 23.

Partnership is the relation which subsists between persons who have agreed to combine their property, labour, or skill, in some business, and to share the profits thereof between them. (*h*) Indian Contract act.

[The combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit.] [1] Parsons.

*Le contrat de société est un contrat par le quel deux ou plusieurs personnes mettent, ou s'obligent de mettre, en commun quelque chose, pour faire en commun un profit honnête, dont ils s'obligent reciproquement de se rendre compte. (*i*) *3 Pothier (1).

Societas est contractus de conferendis dona fide rebus aut operis, animo lucri, quod honestum sit ac licitum in commune faciendi. (*j*) Pothier (2).

Ein Vertrag durch welchen mehrere Personen ihr Vermögen oder Gewerbe oder auch ihr Arbeiten und Bemühungen ganz oder zum Theil zur Erlangung eines gemeinschaftlichen Endzwecks vereinigen, wird ein Gesellschaftsvertrag genannt. (*k*) Prussian Code.

Le contrat de société se fait lorsque deux ou plusieurs personnes mettent en commun leur argent, leurs biens, ou leur travail, à la charge de partager entr'eux legain et de supporter les pertes qui en arriveront, chacun à proportion de ce qu'il contribue du sien. (*l*) Pufendorf.

When two or more persons join money, or goods, or labor, or all of these together, and agree to give each other a common claim upon such joint stock, this is partnership. (*m*) Rutherford.

Partnership, often called co-partnership, is usually defined to be a voluntary contract between two of more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. (*n*) Story.

Verbinden sich mehrere zur Erreichung eines ihnen gemeinschaftlichen Endzwecks so wird diesz ein Gesellschaftsvertrag (*societas*, Mascopei, Magenschaft,) genannt. Geschieht diese Verbindung zu eigennützigen Zwecken so nennt man sie *societas quæstuaria*, oder *negotiatoria*, sons taber *non quæstuaria*. (*o*) Thibaut

Societas est contractus, quo inter aliquos res aut operæ communicantur, lucri in commune faciendi gratia. (*p*) Vinnius.

Societas est contractus jurisgentium, bonæ fidei consensu constans, semper re honesta, de lucri et damni communione. (*q*) Voet.

(*h*) Indian Contract act, § 239; Pollock's Digest of the Law of Partnership, § 1.

[1] Parsons on Partn. 6.

(*i*) Pothier, Traité du contrat de Société, § 1. There is a useful English edition of this work by O. D. Tudor, Esq.

(*j*) Pothier, Pand. lib. xvii. tit. 2, § 1, art. 1.

(*k*) Allgem. Landsrecht für die Preuss. Staat. th. i. tit. 3, § 169.

(*l*) Pufendorf, Le droit de la Nat. et des Gens, éd. Barbeyrac, liv. v. chap. 8, § 1.

(*m*) Inst. of Nat. Law, bk. i. c. 13, § 9.

(*n*) Story on Partn. § 2.

(*o*) Thibaut, System des Pandekten Rechts, § 467, edition 9. This division of partnerships into partnerships having gain for their object and other partnerships is noticed by most German writers on the civil law.

(*p*) Vinn. Inst. iii. 26.

(*q*) Voet. Comm. ad Pand. lib. xvii. tit. 2, Pro Socio, § 1.

Watson. Partnership is a voluntary contract between two or more persons for joining together their money, goods, labor, and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade. (*r*)

*4 *All the above definitions, however, with the exception of Mr. Dixon's, are, with reference to the law of England, too wide; for they include not only partnerships in the proper sense of the word, but also many corporations and companies which differ from partnerships in several important respects. Mr. Dixon's definition avoids this error, but the relation of principals to which he refers is not altogether free from objection. (*s*)

2. *Distinction between partnerships, corporations, and companies.*

Corporations. A corporation is a fictitious person, created by special authority (and by the law of England by the Crown or by parliament), and endowed by that authority with a capacity to acquire rights and incur obligations, as a means to the end for the attainment of which the corporation is created. A corporation, it is true, consists of a number of individuals, but the rights and obligations of these individuals are not the rights and obligations of the fictititious person composed of those individuals; nor are the rights and obligations of the body corporate exercisible by or enforceable against the individual members thereof, either jointly or separately, but only collectively, as one fictitious whole. As the civilians neatly express it—*Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent.*

With partnerships the case is otherwise; the members of these do not form a collective whole, which is regarded as distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually:[1] *Si quid societati debetur singulis debetur et quod debet societas singuli debent.* (*t*)

(*r*) Watson, Partn. p. 1. This definition is copied by Gow in his work on partnership, § 2.

(*s*) See the observations of the Master of the Rolls on the above definitions in Pooley *v.* Driver, 5 Ch. D. 471 *et seq.*

(*t*) See Lloyd *v.* Loaring, 6 Ves. 773; Beaumont *v.* Meredith, 3 V. & B. 180.

[1] Where persons enter into articles of association for banking purposes, and,

The fundamental distinction between partnerships and unincorporated companies is, that a partnership consists of a few *individuals known to each other, bound together by ties of friendship and mutual confi- *5

Companies.
1. Un-incorporated.

without any charter, assume a name, open a stock-book, subscribe for shares of stock, and a portion pay small sums thereon, hold meetings, elect directors, publish the names of such directors, (none of whom take any steps to inform the public that they do not belong to the association), enter into, and transact business as a bank, they are all liable as partners. Pettis *v.* Atkins, 60 Ill. 454.

Persons held meetings and subscribed for stock in a proposed corporation for running a particular steamboat; but, failing to obtain a charter, it was finally agreed to form a limited partnership; but the provisions of the act in relation to such partnership had not been complied with: *Held*, that such persons were not liable, as general partners, for debts contracted in the meantime, by the owner of the boat, for repairs. West Point Foundry Association *v.* Brown, 3 Edw. Chy. 284.

The "New England Express Company," being a co-partnership, and not a corporation, any stockholder subscribing for shares, and paying in part of his subscription, becomes a member of the company and liable for its debts, although he never attended any meetings, or received any certificate of stock, or knew of the contract of the plaintiff. A statute of New York, requiring a suit to be brought against the officers of a co-partnership, before the private stockholders could be sued, relates only to the remedy, and is not in force in Massachusetts. Boston, etc. R. R. Co. *v.* Pearson, 10 Reporter 81.

Certain persons subscribed articles of association, whereby they agreed to unite in a company for building a theatre, and to pay for the shares placed opposite their names at the rate of $500 a share. Trustees were appointed to transact the business of the company, who purchased a site and contracted, in the erection of a theatre, debts considerably above the amount subscribed. Afterwards the company was incorporated: *Held*, that the members were jointly and severally liable as co-partners for all the debts contracted before the incorporation. Haslett *v.* Wotherspoon, 2 Rich. Eq. 395.

Persons associating themselves together under articles, to purchase property and to carry on a manufacturing business; if their organization be so defective as to come short of creating a corporation within the statute, become in legal effect partners; and their rights, as members of the company, to the property acquired by such company, will be recognized and protected. Whipple *v.* Parker, 29 Mich. 369. See, also, Flagg *v.* Stowe, 85 Ill. 164.

As to the creditors, each member of an insolvent voluntary association is liable for all the debts, the same as in ordinary partnerships. Hodgson *v.* Baldwin, 65 Ill. 532.

Where two or more parties agree to form a corporation, some putting in machinery and patents, and others money and labor, but no corporation is formed by reason of a failure to comply with the statute, if the parties are entitled to share in the profits and losses, it will constitute a *quasi* partnership, although the title to the property put in, whether real or personal, may not be changed. Flagg *v.* Stowe, 85 Ill. 164.

But in such case, the persons so operating together, will not become jointly entitled to the property itself, but simply to its use, except

dence, and who, therefore, are not at liberty without the consent of all to retire from the firm and substitute other persons in their places; whilst a company consists of a larger number of individuals not necessarily acquainted with each other at all, so that it is a matter of

as to the money advanced. If the party furnishing the machinery withdraws and files his bill for an account and a sale of the property, he will be liable to account to the party advancing the money, for any loss that has occurred. Flagg *v.* Stowe, *supra*.

In accounting in such case, it is error to allow a certain per cent. for the use of the machinery. It should be the fair value of its use as situated, and not what it might have been worth, if used at some other place. Flagg *v.* Stowe, *supra*.

Associates in forming, and stockholders in a company, assuming to be without legal corporate existence, are liable as co-partners upon contracts made in the name adopted as its corporate name, although the parties dealing with the company believed it to be a corporation, and dealt with it as such; and although the associates and stockholders did not intend to become co-partners and liable as such. Jessup *v.* Carnegie, 12 Jones & Sp. 261.

In Merchants, etc. Bank *v.* Stone, 38 Mich. 779, however, it was held that where a body professing to be a corporation, has been dealt with expressly as such, those who have so dealt with it cannot question its corporate existence for the purpose of charging its members, individually, as if they were partners. Merchants, etc. Bank *v.* Stone, 38 Mich. 779.

Actions upon a promissory note, dated June 3, 1867, made by one of the defendants as agent of the Utica Steam Woolen Mills Company, a corporation whose charter had expired by statutory limitation on February 27, 1866, in ignorance of which fact, the business had thereafter been carried on by the trustees as usual. The action was brought against certain of the stockholders, plaintiff claiming that they were liable as co-partners, for the debts contracted after the expiration of the charter: *Held*, that the action could not be maintained; that the business must be deemed to have been carried on by the directors, acting as trustees, and that persons dealing with the said officers, must be considered as contracting with them in their representative capacity, and as relying upon their responsibility in such capacity. Central, etc., Institution *v.* Walker, 5 Hun, 34.

Evidence that the officers of a corporation did business as if they were partners was held inadmissible where the party dealing with them had not been misled by their neglect to observe corporate formalities, and in a suit against them he was required to establish a corporate liability. New York Iron Mine *v.* Negaunee Bank, 39 Mich. 644.

Stockholders in a manufacturing corporation who, upon the expiration of its charter, agree to continue the business in the name of the corporation, and appoint one of their number as managing agent to carry on the business, and who agree to furnish money when called for by him, in proportion to the number of shares held by each of them in the corporation, are liable to third persons as partners, upon commercial paper made by such agent for the benefit of the firm, and signed with the name of the former corporation by him as agent. National, etc., Bank *v.* Landon, 45 N. Y. 410.

Several persons formed an association, making no provision for future incorporation, by which they severally agreed

comparative indifference whether changes amongst them are effected or not. Nearly all the differences which will hereafter be noticed as existing between ordinary partnerships and unincorporated companies, will be found traceable to the above distinction. Indeed it may be said that the law of unincorporated companies is composed of little else than the law of partnership modified and adapted to the wants of a large and fluctuating number of members.[1]

2. Incorporated companies.

Incorporated companies are societies consisting usually of many persons, having transferable shares in a common fund, but incorporated by Royal Charter or by Act of Parliament. They are not pure partnerships, for their members are recognized as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. Incorporated companies are intermediate between corporations known to the common law and ordinary partnerships, and partake of the nature of both; and the law relating to these companies depends as well on the principles which govern ordinary partnerships, as on those which are applicable to corporations strictly so called. (*u*)

3. *Historical sketch of the law relating to companies.*

Sketch of Company law.

By the common law of this country every association of persons formed for the sake of sharing profits, is either a partnership or a corporation; and a company which is neither a corporation nor a partnership, is a thing unknown to the common law of England. (*v*) It has even been said that a large partnership, the shares in which are transferable without the assent of all the members, is illegal at common law; and although the better opinion is that this is not so (*x*), *still the courts *6

to furnish certain sums, respectively, towards a joint adventure, and afterwards the "directors" of the association obtained an act of incorporation, varying considerably the terms of the original agreement: *Held*, that members of the association who did not assent to the incorporation were absolved from their agreement, and could not be compelled to pay in the sums subscribed by them. Southern Steam Packet Co. *v.* Magrath, 1 McMull, Ch. 93.

[1] Joint-stock associations, except as otherwise provided by statute, are partnerships, and a creditor must proceed against the surviving shareholders before an action can be maintained against the representatives of a deceased shareholder. Moore *v.* Brink, 6 Thomp. & C. 22; s. c. 4 Hun, 402.

(*u*) See the judgments in 5 Ch. 431 and 725.

(*v*) M'Intyre *v.* Connell, 1 Sim. N. S. 233.

(*x*) See Walburn *v.* Ingilby, 1 M. & K. 76.

treat as illegal any association for profit which attempts to arrogate to itself the privileges of a body corporate. (*y*) But within the last century, it may almost be said within the last half century, associations unknown to the common law have struggled into existence, and after much opposition have become legal. These are commonly called companies, or more accurately joint-stock companies.

Progress of joint-stock companies.

When joint-stock companies, *i. e.*, partnerships with a joint-stock divided into numerous transferable shares, began to assume importance, and to force themselves upon the attention of the legislative and judicial departments of the State, the reception they met with was by no means encouraging. Owing to the established rules relating to parties to actions and suits, a joint-stock company could not practically sue its own debtors, nor could disputes between its members be readily, if at all, adjusted. At the same time, the doctrine that each member was answerable for the whole of the debts of the company was studiously promulgated and rigorously enforced.

Regarded as nuisances. 6 Geo. I. c. 18.

Under these circumstances, joint-stock companies were regarded as nuisances, and the first legislative enactment relating to them, was an attempt to put them down altogether. (*z*) This attempt was simply futile; and notwithstanding the Bubble act, joint-stock companies increased both in number and importance. It was not however, until the end of the first quarter of the present century, that the legislature began to retrace its steps.

Reaction.

In the year 1825 the Bubble act was repealed, (*a*) and from that time to the present the legislature has endeavored by various means so to amend the law as to give free scope to a combination of capital, and at the same time to prevent injustice being done either to or by its subscribers.

Even when the opposition which joint-stock companies had *7 *to encounter was greatest, they could always apply to the Crown for a charter of incorporation. Whether a charter would be granted, depended mainly on the opinion which the officers of the Crown entertained of the proposed objects and constitution of

(*y*) Blundell *v.* Winsor, 8 Sim. 601. This subject will be examined more fully hereafter under the head Illegal Partnerships. See Bk. I. c. 6, § 1.

(*z*) 6 Geo. 1, c. 18, commonly called the Bubble act.

(*a*) 6 Geo. 4, c. 91. The 2nd section of the Bubble act had been previously repealed by 5 Geo. 4, c. 114.

the company. If a charter was granted, the company became a corporation for all intents and purposes; and with this, amongst other results, viz., that the members of the company were rendered personally irresponsible for its debts. At common law, the Crown had no power to grant charters of incorporation, and also to declare that the persons incorporated by them should be subject to the same liabilities as members of unincorporated societies.

But in 1825 an act was passed, empowering the Crown to grant charters of incorporation, and at the same time to declare that the persons incorporated should be personally liable for the debts of the body corporate. (*b*) This act was, in the year 1834, followed by another, enabling the Crown, without incorporating a company at all, to confer upon it by means of letters patent, certain privileges, and especially the privilege of suing and being sued in the name of a public officer. (*c*) Both these acts have since been repealed, but the powers conferred upon the Crown by the act of 1834 are still exercisible under the provisions of the repealing act. (*d*)

6 Geo. 4, c. 91.

4 & 5 Wm. 4, c. 94.

7 Wm. 4 & 1 Vict. c. 73.

If a charter could not be obtained from the Crown, a company which desired to be legally recognized as such was compelled to apply to Parliament for a special act of its own. The act usually sought to be obtained was either an act incorporating the company, or an act which, without incorporating it, authorized it to sue and be sued by its secretary, or some other officer. Acts incorporating companies were sometimes silent as to the liabilities of their members, and in that case they were not to any extent responsible for the debts of the incorporated company. But other incorporating acts rendered the members of the company liable for its debts to the extent of their respective shares, or of so much thereof as might not have been paid up. Acts which did not incorporate companies, but merely empowered them to sue and be sued, *invariably, it is believed, contained *8 clauses rendering the shareholders liable for the debts of the company to the fullest extent.

Special acts of Parliament.

Until the year 1826, there was no method by which a company could acquire any of the privileges of a corporation, or the power

(*b*) 6 Geo. 4, c. 91, § 2.
(*c*) 4 & 5 Wm. 4, c. 94.
(*d*) 7 Wm. 4 & 1 Vict. c. 73.

of suing and being sued by a public officer, except by means of a special application to the Crown or to Parliament. But in 1826 a general act was passed enabling joint-stock banking companies to obtain the power of suing and being sued in the name of a public officer, by simply complying with certain specified conditions, and making certain returns to the stamp office. (*e*) And in the year 1844, another general act was passed, enabling all companies (with some exceptions) to obtain from an office in London a certificate of incorporation without applying either for a charter or for an act of Parliament. (*f*) But, what is not a little remarkable is, in this very same year, 1844, the legislature retraced its steps as regards banking companies, and compelled banking companies formed after May, 1844, to apply to the Crown for incorporation. This the Crown was empowered to grant, without however limiting the liability of the shareholders. (*g*)

7 Geo. 4, c. 46.

7 & 8 Vict. c. 110.

7 & 8 Vict. c. 113.

Companies formed under the above acts were essentially partnerships. Their members were liable to their last farthing for the debts of the companies, subject only to this, that before recourse for payment of such debts could be had against an individual member, it was necessary for the creditors to show that they could not obtain payment from the company to which that member belonged. Companies which desired limited liability in any other sense than this were still obliged to procure a charter from the Crown, or a special act of Parliament, and it was not until the year 1855 (*h*) that the law in this respect was altered. In that year, however, an act was passed enabling companies registered under the general act of 1844 (other than insurance companies), to obtain a certificate of incorporation with limited liability. (*i*)

Limited liability.

18 & 19 Vict. c. 133.

*9 *None of these acts provided for the dissolution and winding up of companies. The first act upon this subject was passed in 1844, and it declared what were to be deemed acts of bankruptcy in the case of joint-stock companies, and how bankrupt companies were to be wound up

Winding-up acts.

7 & 8 Vict. c. 111.

(*e*) 7 Geo. 4, c. 46.

(*f*) 7 & 8 Vict. c. 110.

(*g*) 7 & 8 Vict. c. 113.

(*h*) Long before this, however, the Parliament of Ireland had passed an act (21 & 22 Geo. 3, c. 46), authorizing the formation of partnerships with limited liability.

(*i*) 18 & 19 Vict. c. 133.

for the benefit of their creditors. (*k*) In the year 1846 an act was passed for the winding up of railway companies projected before July, 1846, and not incorporated by act of Parliament. (*l*) In 1848 and 1849, two statutes were passed enabling joint-stock companies generally to be dissolved and wound up in equity without the necessity of a bill to which all the shareholders must have been parties. (*m*) The following year, 1850, produced another act for winding up railway companies incorporated by special acts of their own. (*n*)

9 & 10 Vict c. 28.
11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.
13 & 14 Vict. c. 83.

A rapid sketch has now been given of the progress of joint-stock company legislation down to the year 1856. In 1856 and 1857 acts (*o*) were passed, repealing more or less nearly all the acts which have been noticed, consolidating what were supposed to be their must valuable provisions, and introducing extensive alterations of an entirely new character. These acts, however, were themselves repealed by the Companies act, 1862, (*p*) which is now the principal statute relating to joint-stock companies, and will be found printed in the appendix at the end of this treatise. In the same year, 1862, a very important statute was passed relating to industrial and provident societies, (*q*) and placing them on much the same footing as limited joint-stock companies.

Acts of 1856-7.
Act of 1862.

In addition to the statutes which have been referred to already, there was an important act passed in the year 1838, enabling separate creditors of shareholders in public companies to obtain an order charging their debtors' shares, whereby payment of their debts can be obtained without the intervention of a sheriff and a seizure by him of the property of the company; (*r*) and in the year 1841 another act was passed, enabling the Court of Chancery, on a summary application, to restrain any public company from allowing any specified

Other statutes.
1 & 2 Vict. c.110.
*10
5 Vict. c. 5.

(*k*) 7 & 8 Vict. c. 111.
(*l*) 9 & 10 Vict. c. 28.
(*m*) 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.
(*n*) 13 & 14 Vict. c. 83.
(*o*) 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14.
(*p*) 25 & 26 Vict. c. 89, amended by 30 & 31 Vict. c. 47, and c. 131; 33 & 34 Vict. c. 104, and 40 and 41 Vict. c. 26.
(*q*) 25 & 26 Vict c. 87, repealed by 39 and 40 Vict. c. 45. A note on these societies will be found in the appendix.
(*r*) 1 & 2 Vict. c. 110, § 14 *et seq.*

shareholder to transfer his shares or to receive dividends in respect of them. (*s*)

8 & 9 Vict. c. 16.

The year 1845 produced three statutes incorporating clauses usually inserted in special acts of Parliament relating to railway and other companies which interfere with private property; and of these statutes, one, viz., the Companies clauses consolidation act, (*t*) forms an important part of the law to which this treatise relates.

23 & 29 Vict. c. 86.

In 1865, after a long and arduous struggle, an act was passed extending the principle of limited liability to large classes of persons previously excluded from it, and enabling them to lend their money and render their services in consideration of a share of profits, without thereby exposing themselves to indefinite losses. This act, although not in all respects what might be desired, is probably destined to produce social consequences of the greatest importance and most beneficial character.

The criminal law applicable to partners and directors, with respect to thefts, embezzlements, fraudulent accounts, and statements, was amended in 1861 and 1868; and within the last few years important acts have been passed relating to Cost Book mining companies, and Life insurance companies.

The following table shows the statutes now in force relating more particularly to partnerships and companies:

*11 *PRINCIPAL ACTS NOW IN FORCE.		AMENDING ACTS.	
7 Geo. 4, c. 46.	Banking Co.'s (*u*) Amended	generally by	3 & 4 Wm. 4, c. 98. 1 & 2 Vict. c. 96 (*x*) 3 & 4 Vict. c. 111.
		as to issue of notes, &c. by	7 & 8 Vict. c. 32. 8 & 9 Vict. c. 76. 37 & 38 Vict. c. 96.
7 Wm. 4 & 1 Vict. c. 73.	Companies empowered by letters patent to sue and be sued.		

(*s*) 5 Vict. c. 5, § 4.

(*t*) 8 & 9 Vict. c. 16, amended by 26 & 27 Vict. c. 118, and by 32 & 33 Vict. c. 48.

(*u*) The 7 Geo. 4 c. 46, is still in force. But having regard to the subsequent Acts, 7 & 8 Vict. c. 113, 20 & 21 Vict. c. 49, and 25 & 26 Vict. c. 89, those provisions of 7 Geo. 4 c. 46, which relate to the constitution of companies and their powers of suing and being sued by public officers, appear to apply only to companies formed before May, 1844, and not registered under 20 & 21 Vict. c. 49, to 25 & 26 Vict. c. 89.

(*x*) The 1 & 2 Vict. c. 96, was continued by 2 & 3 Vict. c. 68, and 3 & 4 Vict. c. 111, and was made perpetual by 5 & 6 Vict. c. 85 and by 37 & 38 Vict. c. 96, which repealed 5 & 6 Vict. c. 85, and those clauses in 1 & 2 Vict. c. 96, which limited its duration.

PRINCIPAL ACTS NOW IN FORCE.		AMENDING ACTS.
1 & 2 Vict. c. 110	Charging shares by Judge's order	Amended by 3 & 4 Vict. c. 82.
4 & 5 Vict. c. 14	Spiritual persons.	
5 Vict. c. 5	Restraining transfers, &c.	
8 & 9 Vict. c. 16	The Companies clauses consolidation act	Amended by 26 & 27 Vict. c. 118, and 32 & 33 Vict. c. 48.
13 & 14 Vict. c. 83	Winding-up act for railway companies incorporated by a special act of Parliament	Amended by 30 & 31 Vict. c. 127, and 32 & 33 Vict. c. 114.
24 & 25 Vict. c. 96	Fraudulent directors, &c. See §§ 81 to 86.	
25 & 26 Vict. c. 89	The Companies act, 1862	Amended by 30 & 31 Vict. cc. 47 and 131; 33 & 34 Vict. c. 104; and 40 & 41 Vict. c. 26.
28 & 29 Vict. c. 86	Law of partnership amendment act.	
30 Vict. c. 29	An act to prevent the making of contracts for the sale of shares in joint-stock banking companies unless the shares sold are numbered.	
30 & 31 Vict. c. 127	Schemes of arrangement between railway companies and their creditors, &c.	Amended by 32 & 23 Vict. c. 114, and § 4 made perpetual by 38 & 39 Vict. c. 31.
31 & 32 Vict. c. 116	Prosecution of partners stealing partnership property.	
31 & 32 Vict. c. 68	An act to facilitate liquidation in certain cases of bankruptcy, &c. (*y*)	
32 & 33 Vict. c. 19	An Act to amend the law relating to mining partnerships within the Stannaries.	
32 & 33 Vict. c. 71	The Bankruptcy act, 1869.	
*33 & 34 Vict. c. 61	The Life assurance companies act, 1870	Amended by 34 & 35 Vict. c. 58, and 35 & 36 Vict. c. 41. *12
39 & 40 Vict. c. 45	The Industrial and Provident societies act, 1876.	

4. *Different sorts of partnerships and companies.*

Associations of persons having gain for their object, will be found to belong to one or other of the following classes, viz.: Different sorts of partnerships and companies.

1. Partnerships in the proper sense of the word. Partnerships.

2. Partnerships with more members than usual, and with transferable shares. To this class belong all joint-stock companies which do not belong to one or other of the classes following. Large partnerships.

3. Partnerships governed by certain local customs which exclude those laws, applicable to partnerships generally, with which the customs are inconsistent. To this class belong Cost-book mining companies. Partnerships governed by local customs.

(*y*) This act only applies to liquidations pending when it passed.

4. Partnerships privileged by the Crown or the legislature to sue and be sued by a public officer. These companies are sometimes said to be *quasi* incorporated; they include joint-stock banking companies, governed by the act of 7 Geo. 4, c. 46, joint-stock companies governed by the Letters Patent act of 7 Will. 4 & 1 Vict. c. 73, and a number of insurance and other companies governed by special acts of their own.

Partnerships empowered to sue and be sued.

5. Corporations in the proper sense of the term, the members of which are to no extent liable to the debts of the body corporate. These must be created either by royal charter or by act of Parliament, and to them the law of ordinary partnerships has little, if any, application.

Corporations proper.

6. Partnerships incorporated by royal charter or act of Parliament, but so nevertheless, as to leave their members more or less liable to the debts of the whole body. Companies governed by the Companies clauses consolidation act are, and banking companies governed by the repealed act of 7 & 8 Vict. c. 113, were types of this class.

Incorporated companies.

7. Partnerships incorporated by registration. These constitute the great mass of joint-stock companies, and are of two sorts, according as the liability of the members for the debts of the body corporate is unlimited, or limited.

Registered companies.

*13 *The first sort included all joint-stock companies governed by the repealed act of the 7 & 8 Vict. c. 110, and it includes all unlimited companies registered under the acts of 1856–8, or under the Companies act, 1862.

Unlimited.

The second sort included those companies which availed themselves of the short-lived act of the 18 & 19 Vict. c. 93, and now includes all companies registered as limited companies under the acts of 1856–8, or under the Companies act, 1862. (*z*)

Limited.

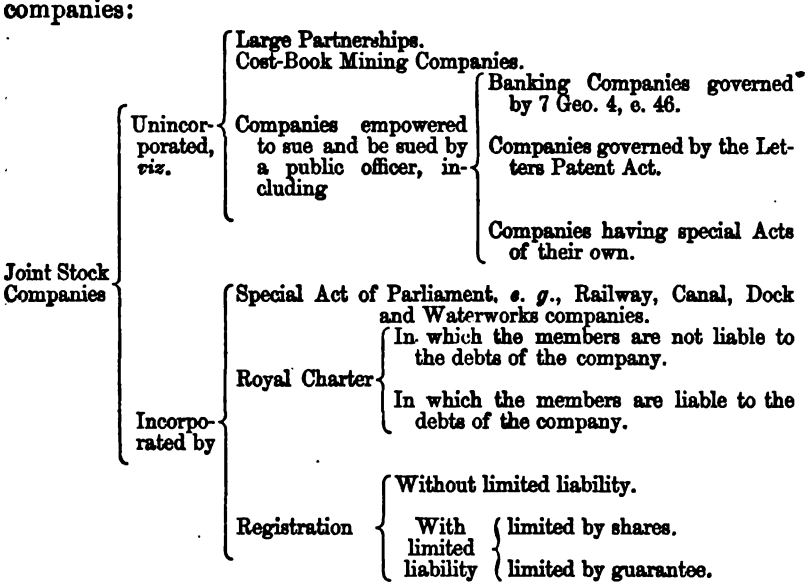
Limited liability companies again are of two sorts, viz., 1, those in which the liability of the members is limited by the amount of their shares; and 2, those in which the liability of the members is limited by guarantee; *i. e.*, by the amount they have respectively undertaken to pay in the event of a contribution becoming necessary in order to discharge the liabilities of the company. (*a*)

(*z*) To this class also belonged Irish anonymous partnerships, governed by 21 & 22 Geo. 3, c. 46 (Irish), repealed by the Companies act, 1862.

(*a*) 25 & 26 Vict. c. 89, § 7.

Companies limited by guarantee may have their capitals divided into shares or not, (*b*) and are supposed to admit of greater varieties of internal organization than companies limited by shares. The latter, however, are much the most numerous.

The following table conveniently exhibits the above classes of companies:



*For some purposes, and particularly in order properly to interpret certain statutes, (*c*) it is necessary to distinguish *public companies* from others. But in this, as in many other instances, the word public is used with no definite signification; and it is extremely difficult to say exactly what the essential character of a public company really is. It has, however, been decided that banking companies, governed by the 7 Geo. 4, c. 46, are public companies within the meaning of the statute 1 & 2 Vict. c. 110, § 14; (*d*) and from that decision it would seem that those companies only are public which are either incorporated, or, if unincorporated, are endowed by the *14 Public Companies.

(*b*) Ib. § 14.

(*c*) The statutes here referred to are: 1 & 2 Vict. c. 110, § 14, relating to executions against shareholders for their separate debts; 24 & 25 Vict. c. 96, §§ 81 to 84, relating to frauds by directors, officers, and members of companies; 33 & 34 Vict. c. 35, § 5, relating to the apportionment of dividends.

(*d*) McIntyre *v.* Connell, 1 Sim. N. S. 225.

Crown or the legislature with some special privileges, and are bound to make some kind of return or list of their members which the public have a right to see. A mere partnership, however large and however transferable its shares, is apparently not a public company. (e)

In order to acquire an adequate knowledge of the law of companies, it is absolutely necessary to understand the law of partnership, of which the first is, to a great extent, a mere statutory development. For this reason the two subjects are blended together in the present treatise: and every topic discussed is examined, first, with reference to partnerships, and, secondly, with reference to companies, and particularly with reference to those governed by

1. The Banking act of 7 Geo. 4, c. 46.
2. The Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73.
3. The Companies clauses consolidation act, 8 & 9 Vict. c. 16.
4. The Companies act, 1862.

(e) See the last case, and Jones v. Ogle, 8 Ch. 192.

*BOOK I. *15

OF CONTRACTS OF PARTNERSHIP; THEIR CREATION AND DISSOLUTION.

CHAPTER I.

THE NATURE OF THE CONTRACT DETERMINED.

PRELIMINARY OBSERVATIONS.

The basis of all partnerships is an agreement to share the profits arising from some business or undertaking. Usually, but not necessarily, partners have a joint capital or stock, by the employment of which the profits to be shared are expected to arise; and in ordinary partnerships, but not in companies, each partner usually takes an active part in the prosecution of the partnership business. Nothing, perhaps, can be said to be absolutely essential to the existence of a partnership except a community of interest in profits resulting from an agreement to share them. But, although this is so, the usual characteristics of an ordinary partnership are a community of interest in profits and losses, a community of interests in the capital to be employed, and a community of power in the management of the business engaged in.[1]

Agreement to share profits the essence of a partnership.

[1] In Nebraska R. R.Co. *v.* Lett, 8 Neb. 251, it is said that the two leading features of partnership are a common interest in the stock of the company and a personal responsibility for the partnership contracts.

Mere agency does not constitute a partnership. Thus, an agreement by which a manufacturing firm give another firm, to whom they are largely indebted, the entire control and management of their business, assigning all their machinery and tools to the latter firm, and authorizing them to collect all moneys due the former, and therewith to pay said indebtedness, at their pleasure, does

Profits and losses.

Profits (or net profits) are the excess of returns over advances; the excess of what is obtained over the cost of obtaining it. Losses on the other hand, are the excess of advances over returns; the excess of the cost of obtaining over what is obtained. Profits and net profits are for all legal purposes synonymous expressions; but the returns themselves are often called gross profits; hence it becomes necessary to call profits net profits in order to avoid confusion in the *present treatise, however, the word profits will be used in the sense of net profits; and the expression gross profits will be avoided as much as possible.

Gross profits, Net profits.

*16

Persons who share both advances and returns, and also persons who share the difference between them, whatever that difference may be, necessarily share both profits and losses; profits, if the returns exceed the advances; losses, if the advances exceed the returns. But persons who share profits, *i. e.*, the excess of returns over advances, do not necessarily share losses; for profits may be shared by those who make no advances, and persons may stipulate for a division of gain, if any, and yet some one or more of them may by agreement be entitled to be indemnified against losses by the others; so that whilst all share profits, some only bear losses.

Sharing gross returns.

The actual or gross returns obtained by advances obviously include profits, if profits have been made. But those returns do not include losses, if losses are incurred; for losses are the excess of the advances over the returns, and come out of the advances, and not out of the returns. Hence persons who share gross returns necessarily share profits, but they do not *by sharing the returns* share losses, for these fall entirely on those making the advances. Moreover, although a division of gross returns is a division profits, if there are any, it is so only incidentally, and because such profits are included in what is divided; it is not a division of profits as such; and under an agreement for division of gross returns, whatever is returned must be divided, whether there be profit or not.

not constitue the two firms co-partners. Brundred *v.* Muzzey, 25 N. J. L. 268.

An arrangement between B and C for "mutually keeping house," by which C is to pay the house-rent and butcher's bill, and B is to pay the other bills for the family expenses, does not, as matter of law, make B and C partners, or authorize C to bind B to third parties for the rent Austin *v.* Thompson, 45 N. H. 113.

On the other hand, if the persons sharing gross returns also share the advances by means of which the returns are made, there is necessarily community both of profit and of loss; community of profit if the returns exceed the advances, community of loss if the advances exceed the returns.

Distinction between sharing profits and gross returns.

The above remarks have appeared necessary in order to explain the reasons for the distinction made by English lawyers between agreements to share profits (*i. e.*, net profits and profits as such) on the one hand, and agreements to share gross returns (sometimes called gross profits) on the other: and in order to account for the rule that whilst an agreement to share profits creates a partnership, an agreement to share gross * returns does not.[1] The reasonableness however of the *17 above distinction is very questionable, at least where there is any community of capital or common stock; and the rule itself is probably attributable less to the difference which exists between net profits and gross returns than to the doctrine which so long confused the whole law of partnership in this country, and according to which all persons who shared profits incurred liability as if they were really partners. When this doctrine was rife, the distinction between sharing net profits and gross profits (*i. e.*, returns) had considerable practical value; but, as will be seen hereafter, the doctrine in question is now wholly exploded, and the distinction alluded to is of little importance.

Quasi-partnership.

The doctrine to which reference has been made renders it necessary to caution the reader against an ambiguity in the word partnership as used by English lawyers. Partnerships are by them divided into partnerships (properly so called), and partnerships as regards third persons, which are not in fact partnerships at all, and should never be so styled.[2] What is

[1] See this distinction, approved in Turner *v.* Bissell, 14 Pick. 192; Everett *v.* Coe, 5 Den. 180; Heimstreet *v.* Howland, Id. 68; Ambler *v.* Bradley, 6 Vt. 119; Bowman *v.* Bailey, 10 Id. 170; Mason *v.* Potter, 26 Id. 722; Patterson *v.* Blanchard, 5 N. Y. 186; Moore *v.* Smith, 19 Ala. 774. See, also, Sankey *v.* Columbus Iron Works, 44 Geo. 228, explaining Sec. 1880, Rev. Code; Wood *v.* Valette, 7 Ohio St. 172; *post*, pp. 18, 19, notes.

See, however, *contra*, Denny *v.* Cabot, 6 Metc. 82; Pa s. on Part. *88, and note.

See *post*, p. 37.

[2] Parties may often be adjudged partners as to third persons, when they could not be so regarded as between themselves. Stanchfield *v.* Palmer, 4 G. Greene, 23; Gill *v.* Kuhn, 6 Serg. & R. 333: Kellogg *v.* Griswold, 12 Vt. 291.

Where two persons agree to raise together a crop of corn, and divide the

called a partnership as regards third persons (*quasi*-partnership), is nothing more than a number of persons, who, in consequence of certain acts done by them, are held liable for each other's conduct, as if they had entered into a contract of partnership amongst themselves. What these acts are will be considered hereafter; but the reader is requested to bear in mind that for the present, partnerships properly so called, and not *quasi*-partnerships, are intended to be spoken of.

Having made these preliminary observations, it is proposed to consider what agreements do, and what do not, result in a partnership in the proper sense of the word.

---

*18 *SECTION I.—OF TRUE PARTNERSHIPS.

1.—*Partnership is the result of an agreement to share profits and losses.*

Agreements to share profits and losses.

Whether an agreement creates a partnership or not depends on the real meaning of the parties to it as expressed in the agreement itself. (*a*) [1] But an agreement to share profits and

product, the agreement constitutes a partnership. Allen *v.* Davis, 13 Ark. 28.

But a contract by which A agreed to let B have all the pine timber on his lands suitable for good lumber, and B agreed to pay A therefor, annually, in money, one-fifth of the lumber sold and collected by him, does not constitute A and B partners *inter sese*. Fail *v.* McRee, 36 Ala. 61.

(*a*) See Ross *v.* Parkyns, 20 Eq. 331, and other cases cited, *infra*, p. 20, note (*l.*)

[1] Whether two or more persons associating in business are partners, as between themselves, depends upon their intentions, as legally ascertained. Salter *v.* Ham, 31 N. Y. 321; Stevens *v.* Faucet, 24 Ill. 483; Niehoff *v.* Dudley, 40 Ill. 406; Macy *v.* Combs, 15 Ind. 469; Gray *v.* Gibson, 6 Mich. 300; Hazard *v.* Hazard, 1 Story, 371. See, also, Manhattan B. Manfg. Co. *v.* Sears, 1 Sweeny, 426.

Voluntary consent to the relation and obligations of partnership is necessary. Hedge's Appeal, 63 Pa. St. 273.

The facts that several persons associated together to run a line of stage coaches; that they had a general meeting, and that debts were contracted on account of the company, do not prove a partnership as between them. Chandler *v.* Brainard, 14 Pick. 285; Clark *v.* Reed, 11 Id. 450.

The defendants signed articles of association in trade, under the name of "The Farmers and Mechanics Store," by which it was provided that any stockholder might withdraw upon giving six months' notice, and that the business of the company should be done pursuant to a major vote of those present. The defendants subscribed a certain sum, and a by-law provided that

losses, may be said to be the type of a partnership contract. What-

each subscriber should become a partner: *Held*, that the defendants were partners in the company. Atkins *v.* Hunt, 14 N. H. 205.

A, who was the remaining partner of a manufacturing firm which had been dissolved, said to B that, as his business was so extensive, it was necessary for him to have a partner, so that, in case of his decease, there would be some one who could go on and close up the concern without the delay arising from an administration of his estate, and proposed to take him, (B,) as such partner, saying he should have $1,500 the first year, and the next year an interest in the business; to which B assented, and thereupon an agreement was drawn and signed by them as follows: "Co-partnership. The subscribers have this day formed a co-partnership under the style of A & Co., and will hereafter carry on the business formerly conducted by A & C." Public notice of this agreement was given subsequently, and until the death of A, which occurred before the expiration of the first year, all purchases, sales and consignments of goods were made, and all drafts were drawn, and promissory notes were given, by A & B in the name of A & Co.; and each of them exercised the full power of a partner in relation to all their business. *Held*, that they were partners, and that after A's death, B, as surviving partner, had power to commence proceedings in insolvency which should include the estate of the firm. Adams Bank *v.* Rice, 2 Allen, 480.

L and G agreed in writing to "have the right to use the name of each other as a firm name," and G did "grant that L" should "have the right to go to any of the wholesale markets and purchase goods, and sell the same at W;" and G did "do this for the benefit of L, not claiming any of the profits arising from the sale of any goods or articles sold at W." It was also agreed that "all money furnished to enable the said firm L & G," etc., "to each other," should "be held at the rate of seven per cent" *Held*, that this agreement constituted L and G partners. Hendrick *v.* Gunn, 35 Ga. 234.

B orally agreed to contribute his inchoate interest in an invention, and S to furnish the money necessary to make that invention available in the form of a patent, both to contribute their services to make it remunerative: *Held*, to be an agreement for a partnership, and not a contract for the sale of goods, wares and merchandise, within the statute of frauds. The patent, when obtained, would be, in equity, partnership property, no matter in whose name it might be taken out. Somerby *v.* Buntin, 118 Mass. 279.

A contract between A & B, and C, by which the former were to furnish the latter goods at cost, to hawk and peddle, adding seven per cent. at such time as C might require, C to furnish a wagon, and to devote his whole time to peddling the goods, the expense of the license, traveling expenses, etc., to be deducted from the amount of the sales, and the balance or profits to be divided, two-fifths to C, and three-fifths to A & B, the goods and merchandise, as well as the notes received on the sale of the goods, to be at the risk of the parties, in the proportion of two-fifths to C, and three-fifths to A & B, makes the parties, as between themselves, partners. Emanuel *v.* Draughn, 14 Ala. 303.

An agreement to engage in the business of prospecting for and the development of, lode mining property, for the joint use of all, is in the nature of a partnership agreement, and under it each party thereto becomes the agent of the other. Lawrence *v.* Robinson, 4 Col. 567.

Where a manufacturing business con-

ever difference of opinion there may be as to other matters, it ad-

nection, carried on for many years by a father and his four sons, had all the elements of a partnership except the father's consent: *Held*, that there was no partnership; but the Supreme Court allowed the bill praying a dissolution and account to be retained, in order that the question might be presented whether such a state of facts appeared from the record as would entitle the complainant, (one of the sons,) to compensation on the principle of a *quantum meruit*, and to have the cause remanded, with leave to amend the bill for that purpose. Phillips v. Phillips, 49 Ill. 437.

If two persons enter into a joint contract in writing, to perform certain labor and furnish certain materials for another, which contract does not define the relations of such persons between themselves, and if, by the understanding between themselves, one is to perform one part of the labor and the other another, and each is to receive a proportional sum of the money paid for the whole, the relation of partners does not by reason of these facts exist between them. Smith *v.* Moynihan, 44 Cal. 53.

A and B, by a written contract, agreed to carry on a trade or business in partnership, and in the same instrument B and C agreed to carry on a different trade or business in partnership: *Held*, that the relation of partners was not created between the three, so as to enable a person dealing with A & B, or with B & C, to commence an action against the whole. Elderkin *v.* Winne, 1 Chand. 27.

The joint prosecution of a lawsuit does not, *per se*, create a partnership between the parties as to the subject matter in dispute. Wilson *v.* Cobb, 28 N. J. Eq. 177.

An agreement between a sawyer in Wisconsin and a lumber merchant in Chicago, whereby the latter was to advance $10,000 to be used by the former in sawing, etc., and the former to deliver all the lumber produced to the latter at $1.00 per M less than the market rates at the time of the arrival of each cargo in Chicago, does not create a partnership. Freese *v.* Ideson, 49 Ill. 191.

A made the following written agreement with B: "Sold B, on joint account with A, 2000 boxes of candles, at 26 cents, six months from delivery; B to be allowed 2½ per cent. on sales; on all sales not approved by A, B is to guaranty the same, receiving a commission of 2½ per cent.; for half of the sales made by B he is to pass over the paper to A; there are to be no charges for storage, property in store to be covered by insurance by B for joint account and expense." A delivered the candles to B under this agreement, and received from time to time, as the candles were delivered, eight notes of B for half the value of the candles, payable in six months, two of which were paid by B at maturity, and the others indorsed and negotiated by A, and afterwards paid by him, B having become insolvent: *Held*, that these facts showed a sale of an undivided half of the candles by A to B, and not a partnership between A and B with regard to the candles; and therefore that A had no lien on B's half of the candles as against B's assignees in insolvency. Hawes *v.* Tillinghast, 1 Gray, 289.

A, having given his notes to certain creditors of a partnership for debts due to them from the partnership, gave a written agreement to one of those creditors that he would not enforce the amount of said notes against the partnership until said creditors should have been fully paid all sums then due and thereafter to be due from the partnership, and that the amount of his notes "as to all said creditors should remain as part of the business capital of" the partnership for three years: *Held*, that

mits of no doubt whatever that persons engaged in any trade, busi-

this agreement did not make A a co-partner, nor prevent his proving against the estate of the partnership in insolvency a note given to him by them, in consideration for his said notes. Wall *v.* Balcom, 9 Gray, 92.

Where the plaintiff and one P. purchased a mail contract from the original contractors, and executed to them a bond for the performance of the contract, and procured four of the five defendants to sign with them as sureties; and afterwards the plaintiff sold his interest in said contract to P. and took from him a like bond, signed by the remaining defendant, with one of the others as sureties; and afterwards, P having failed to perform the contract, the plaintiff and the five defendants signed a contract which recited that the "*undersigned*" had taken charge of said property, and by which they constituted the plaintiff their "agent or superintendent" on said mail route, for which he was to "receive a reasonable compensation, and by which they bound themselves to indemnify all persons who might assist the plaintiff in the execution of said business; and also to pay the bills which had accrued under the plaintiff and P. It was *held* that the plaintiff did not thereby become a partner with the defendants, but might sustain an action against them on the contract. Stearns *v.* Haven, 16 Vt. 87.

An instrument in the following form: "The following is the property owned jointly or as described below, by G. F. and J. W. One hundred acres in, etc., bought from O. W. and since sold for $7,500 to V. S. $2,100 paid, out of which J. W. received $1,000. Two acres on the hill, etc.; each paid half in full, and sold by G. F. for $2,600, no part of which has been given to J. W. Six lots in, etc., one-third undivided belongs to J. W. as per deed on record. Nineteen acres on, etc., bought of D. U. the whole of the purchase money was paid by J. W. G. F. paid A. B. $50 for getting the land. See the deed for particulars. The titles to the above lands are in the name of G. F. and on record, which the deeds will explain. I certify that the above statement is correct, except the taxes and other expenses. (Signed) G. F:" *Held*, not to show a *partnership* between G. F. and J. W. in purchasing and selling lands. White *v.* Fitzgerald, 19 Wis. 480.

A bill in equity, filed before St. of 1857, Ch. 214, alleged that the parties made an oral agreement that the defendant should advance the requisite money to purchase a tract of land, and to build warehouses thereon, in consideration that the defendant should be paid from the proceeds all the money so advanced by him, with interest and 5 per cent. commission for the use and advancement of the money; that, for greater security, a deed of the land was made to the defendant, which, although absolute on its face, conveyed the land to him as security for the money to be so advanced, and in trust for the plaintiff; that warehouses were erected on the land with money so advanced by the defendant, and money advanced by the plaintiff; that portions of the property were sold, and the proceeds received by the defendant; and that a part of the property remained unsold; and prayed for a conveyance of this part of the property, and for an account. The answer denied the allegations in the bill, and averred that the actual agreement was that a partnership, of which the defendant was a member, should advance the money, and receive from the proceeds the amount advanced, with interest and 5 per cent. commission for advancement, and 6 per cent. commission on all amounts received by them therefrom; and that the surplus, if any,

ness, or adventure upon the terms of sharing the profits *and* losses

should be paid to the plaintiff, and averred performance of the agreement on the part of defendant and his partner: *Held*, that this agreement did not constitute a partnership between the parties; that it could not be enforced as a trust, nor as a case of constructive fraud, and that the complainant could not, without amending his bill, avail himself of the agreement admitted in the answer. Buck *v.* Dowley, 16 Gray, 555.

The Washington Medical College of Baltimore, executed on the 24th of July, 1835, a deed of trust, conveying to certain trustees therein named, upon the trust therein expressed, a leasehold interest in a lot of ground in the city of Baltimore. The deed recites "that towards erecting a building on said lot, the sum of $50,000 has been agreed to be contributed by various persons, who are to be identified by being the owners of certificates therein described, and that said college has agreed with said persons to secure the reimbursement of their respective contributions, and the payments of the dividends arising thereon in the manner therein pointed out." The form of the certificate is then prescribed, each being for the sum "of $60, part of said $50,000, to be entitled to a dividend proportioned to its amount, when the same shall arise, payable semi-annually, by the treasurer, for the time being, of the college; said sum to be accepted by the party to whom the certificate is issued or his assigns, in discharge to that extent of said deed, and of his claim to the property thereby conveyed, when tendered at any time after the 4th of July, 1845, by the grantors or their assigns." The trusts are: 1st, That the grantor shall occupy and use the property, and receive the rents and profits thereof until sold and disposed of, as therein provided. 2nd. That if the dividends on said certificates shall be in arrear and unpaid for one year from the date thereof, then it shall be lawful for the grantees to sell the property, and out of the proceeds pay and reimburse the owners of said certificates the full amount of the principal moneys mentioned in them, and all dividends that shall have accrued thereon, and pay over the residue, if any, to the grantor, or its successors or assigns: *Held*, that this deed does not place the contributors and corporation in the relation of partners with each other, or among themselves; that it provides simply for a loan of money by the contributors to the corporation, to secure the re-payment, of which the latter gave them a lien upon the lot and premises in question, and that, consequently, they have superior rights to any creditor of the corporation, becoming such after the execution of the deed. Conkling *v.* Washington University, 2 Md. Ch. 497.

Several persons signed articles of association, fixed the amount of the capital stock, chose officers, and issued certificates of stock, intending to form a corporation under St. of 1866, Ch. C. 230. but the association failed to become a corporation. Some of the members of the association subscribed for stock and received certificates therefor, and others did not subscribe. A and B, two of the subscribers, who had been chosen president and treasurer, respectively, took possession of real estate, authorized to be purchased by a vote of the association, and carried on the business intended to be carried on by the corporation when formed, as agents of the proposed corporation, borrowing money on their own notes and putting it into the business, with the knowledge of the other members, buying goods from the other subscribers and from persons who had not subscribed, and intending to turn over the business to the corporation upon its organization: *Held*, on a bill in

arising therefrom, are partners in that trade, business, or adventure.[a] On this principle in Green *v.* Beesley, (*b*) a partnership was

equity by A and B against all the other subscribers, as partners, for a settlement of the alleged partnership affairs, that neither the defendants who had subscribed to the stock of the proposed corporation, nor those who had not subscribed, were partners with A and B. Ward *v.* Brigham, 127 Mass. 24.

[a] Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Miller *v.* Hughes, 1 A. K. Marsh. 181; Brown *v.* Robbins, 3 N. H. 64; Parviance *v.* M'Clintle, 6 Serg. & R. 259; Winship *v.* Bank of United States, 5 Pet. 529; Cumpston *v.* M'Nair, 1 Wend. 457; Perry *v.* Butt, 14 Ga. 699; Solomon *v.* Solomon, 2 Ga. 18; Gregory *v.* Dodge, 14 Wend. 593; Belknap *v.* Wendell, 21 N. H. 175; Nicoll *v.* Mumford, 4 John. Ch. 522; Meador *v.* Hughes, 14 Bush, 652; Bulfinch *v.* Winchenbach, 3 Allen, 161; Martin *v.* Tidwell, 36 Ga. 332; Smith *v.* Small, 54 Barb. 223; Pierce *v.* Shippee, 90 Ill. 371; Eldridge *v.* Troost, 6 Robt. 518.

Where there is no joint expense, no joint property, no joint fund, no joint losses, no joint profits, and no arrangement to share profit and loss, there is no partnership. A communion of profit is of the very essence of the contract of partnership, for, without this communion of profit, a partnership cannot in contemplation of law exist. Irvin *v.* Nashville, Chattanooga & St. Louis R'y Co. 92 Ill. 103.

Where there was an arrangement between different railroads connecting with each other, whereby each road agreed to carry the cars of the others having the name "Green Line" painted thereon, over its own road, without breakage of bulk, at such rates as might be agreed on, each company fixing its own rates of freight passing over its own road, and collecting the same as the freight passed over its road, and having no interest in freights not reaching its road; each road desirious of making a through rate over other roads *via* these "Green Line" cars, would ascertain the rates the intermediate road or roads charged, and, adding the same to its own rates, fix its own schedule of through rates, which it termed "Green Line Rates," and there was no joint expense or loss or profit, except that where a loss accrued that could not be located on any particular road, a *pro rata* share of the loss was borne by all that carried the freight: *Held*, that there was no partnership between the roads. Irvin *v.* Nashville, etc. R'y Co. *supra*.

And where there was an arrangement like the foregoing, the fact that the words "Green Line" were painted on the roof of a wharf-boat, and were also printed at the top of bills of lading, the name of the railroad company being also printed on the bills of lading, would not estop such railroad company from denying that there was such a partnership. Irvin *v.* Nashville, etc. R'y Co. *supra*.

To constitute a partnership, it is not essential that all the parties should be liable to share indefinitely in the losses. If they participate in the profits and are liable to bear or be affected by the losses to only a limited extent, it will be sufficient. Nor, in a general partnership, is it essential that they should be proportionate joint owners of the property of the concern. The whole capital may, by a stipulation to that effect, be the property of one only of the parties, while the joint participation of

(*b*) 2 Bing. N. C. 108.

held to result from an agreement that the plaintiff should horse a mail cart and be paid by the defendant 9*l.* per mile per annum for

all in the net profits may be such as to make them general partners. Brigham *v.* Dana, 29 Vt. 1.

If parties, after they become partners, have a common interest in the unsettled business of a former concern, or in its profits and losses, they are, as between themselves, partners in that business. McGill *v.* Dowdle, 33 Ark. 311.

An agreement between parties in regard to the transaction of a certain business, wherein all furnish specified proportions of the capital, jointly own the property purchased, which is to be sold for their joint and mutual benefit, and each is to contribute his skill and assistance to the business, and share in specified proportions in the final profit or loss thereof, which are to be ascertained at the close of the business, will, as between the parties themselves, although they may not have been aware that such was its legal effect, create a partnership. Duryea *v.* Whitcomb, 31 Vt. 395.

An agreement between two partners, on the dissolution of their firm, to the effect that one should take all the goods on hand, and the notes and accounts due the firm, and, in consideration of the other's interest therein, should pay all the outstanding debts of the firm "and give him, from that time forward, one-third interest in the profits arising from the sale of said goods," the latter "agreeing to share one-third of the losses that might accrue from said sale of said goods, and to act as clerk in the sale of said goods" for the former,—constitutes them partners *inter sese*. Scott *v.* Campbell, 30 Ala. 728.

A written contract, by which the defendant was to, and did receive, of the plaintiff $250, with which to go to California to engage in gold-digging, for two years, during which time his earnings were to be divided with the plaintiff, construed as making the return of the money advanced dependent upon the result of the adventure, and as thus constituting the parties joint adventurers, if not strictly partners. Brigham *v.* Dana, 29 Vt. 1.

The contract in this case mentioned no other business than that of gold-digging, in which the defendant engaged upon arriving in California, but he abandoned it soon after and engaged in teaming and trading, in the profits of which the plaintiff claimed an interest: *Held*, from the correspondence between the parties, etc., that the plaintiff was entitled to an interest therein, as well as in the profits of the gold-digging. Brigham *v.* Dana, *supra*.

Where two persons entered into an agreement to engage together in a mining adventure, under a firm name, and to share the profits and losses equally, and as a firm they purchased a mine, and paid a note given in the firm name for a portion of the price: *Held*, that the contract was one of partnership, in the ordinary sense as distinguished from what is known as a "mining partnership," and that either partner had the same authority to bind the firm as if it were an ordinary trading partnership. Decker *v.* Howell, 42 Cal. 636. See, also, Duryea *v.* Burt, 28 Cal. 569; Stapleton *v.* King, 33 Iowa, 28.

A contract, however obscurely or inartificially drawn, by which the parties agree to contribute merchandise to "a certain concern," one to be the salesman, the other to pass as proprietor, and both to share equally in the expenses and profits, will be a partnership. Marks *v.* Stein, 11 La. Ann. 509.

An agreement provided that the party of the first part should obtain in his own name, but for the joint account of him-

so doing, and that the plaintiff and the defendant should share the expenses of repairing and replacing the carts and the moneys re-

self and the parties of the second part, a lease of a railroad, and manage the same at a designated salary, for their mutual benefit; and that the parties of the second part should furnish the money necessary to carry out the enterprise, to be reimbursed, with interest, out of its annual profits; and then declared that, after the payment of the capital thus invested and interest, the annual profits should be equally divided between all the parties, and that all losses should be equally borne between them: *Held*, that the agreement constituted a partnership. Beauregard *v.* Case, 91 U. S. 134.

Where creditors agreed with each other to advance the moneys necessary to continue and carry on the business of their debtor, for their own profit, they to contribute the funds necessary for the purchase of stock for the business in equal proportions, and the profits to be realized to belong to the creditors advancing the moneys equally, the losses of the business being borne by them in the same proportion: *Held*, that a copartnership relation in respect to such enterprise was established between the parties. Wills *v.* Simmonds, 51 How. Pr. 48.

Where two agree that one shall furnish the land and stock and the other the labor, and both share the expenses and the crop equally, they are *inter sese* partners. Holifield *v.* White, 52 Ga. 567. (Holloway *v.* Brinkley, 42 Ga. 226; and Smith *v.* Summerlin, 48 Ga. 425, distinguished).

A, the owner of an invoice of goods in the city of New York, sold one-half of his interest therein to B, who was to proceed to San Francisco and there dispose of the goods on joint account: *Held*, that this constituted them partners. Soule *v.* Hayward, 1 Cal. 345.

A joint undertaking and community of profit and loss, in the results of the business, constitute a partnership, although each partner retains the exclusive ownership of the separate property contributed by him to the use of the partnership. McCrary *v.* Slaughter, 58 Ala. 230.

A. in a letter to G., stated the result of conversations agreed upon, thus: G. was to go to Canton and reside there for five years; to buy or hire a factory for the business A. was about to engage in; to transact no other business except that and commission business; to incur no liability as factor or for goods, unless authorized by A. in writing; G. to have one-fifth and A. four-fifths of the commissions; G. to be at liberty to speculate in goods, for their use at Canton, to not over $100,000 per year, for the joint account and risk of A. and G.—one-fifth for the latter and four-fifths for A.; A. to advance $500,000 for the business in money and ships, and to charge interest on advances, the profits to remain in the trade, except $2,000 a year to G. out of his share, and in the end A. was to have four-fifths and G. one-fifth of the net profits; A. was to place to the account of this business all net commissions arising from consignments to him at New York from Canton; and each was to render to the other a yearly account of the transactions alluded to. G. at the foot of a duplicate of this letter, bound himself to abide by and comply with its terms and conditions: *Held*, to constitute A. and G. partners *inter sese*. Ogden *v.* Astor, 4 Sandf. 311.

Stone purchased a permit to cut timber, and paid for it. He afterwards agreed to share profit and loss with Sawtelle, who helped him to get out the lumber. Dwinel, who appears to have been an individual creditor of Sawtelle's, summoned Stone as trustee in an action against Sawtelle. Stone defended on the ground that one partner cannot be charged as trustee of another: *Held*, 1.

ceived for the conveyance of parcels and the losses occasioned by their loss or damage.

That Sawtelle's labor having been performed upon the lumber, and its price and value having become incorporated with the lumber, there were no funds, no effects, no means for profit and loss separate from the lumber, or capital or subject matter of the agreement to share profit and loss, and that therefore there could be no profit and loss, or interest separate from the capital or subject matter in which there was a community of interest. 2. That the title to the subject matter or capital, *i. e.*, to the permit and lumber, was in Stone alone, and that between Stone and Sawtelle there was no community of interest in it. That there being no community of interest in either capital or in a separate profit and loss, there was no partnership between Stone and Sawtelle. Dwinel *v.* Stone, 30 Me. 384. See, also, National Union Bank *v.* Landon, 66 Barb. 189; Chase *v.* Barrett, 4 Paige, 148.

Sharing in the profits and loss of a business is not decisive in investing and imposing upon two parties, as between themselves, the rights and liabilities of co-partners; it may be merely an arrangement with a view to compensation for services rendered by one in the employment of another, the amount of compensation to depend on the success of the business in which they are engaged or interested. Morgan *v.* Stearns, 41 Vt. 405. See *post*, p. 130.

Where two wool firms agreed to furnish each a stated proportion of a quantity of wool to be sold to a certain vendee, and to share profit and loss in the transaction, but the contract to furnish the wool was made by one of the firms, and the other was not originally a party to it, but the contracting firm afterwards applied to the other firm for a part of the wool necessary to enable it to fill the contract which was furnished under the above stated arrangement: *Held*, that they were not partners *inter sese* in the transaction, and could not jointly sue the vendee for non-fulfilment of his contract. Snell *v.* De Land, 43 Ill. 323.

Where two mercantile firms agree to make contracts in the names of their respective firms, for the purchase and sale of merchandise, to be executed with their separate funds, and to share profit and loss on such contracts, they are not co-partners, either as between themselves or with respect to third persons. Smith *v.* Wright, 5 Sandf. 113.

A. & M. partners, owned three-fourths of a vessel, and B. & K. partners, owned the one-fourth; they agreed to fit her out on a voyage from New York to Laguira. A. & M. purchased three-fourths of the cargo, and chiefly, if not wholly, with notes lent and advanced to them by P. & R. commission merchants. B. & K. purchased the other one-fourth of the cargo, for which they paid their own money, and shipped the same on board the vessel; but it was not distinguished from the rest of the cargo by any particular marks; and the whole cargo was to be sold at Laguira for the joint account and joint benefit of the owners, A. & M. and B. & K. M. went out as the supercargo and agent, and having sold the cargo at Laguira, he invested the proceeds in a return cargo, with which the vessel set sail for New York, but was obliged, by stress of weather, to put into Norfolk, where M. sold the return cargo, except a small parcel of coffee, and for the avails received bills of exchange, which he endorsed, and remitted, with the parcel of coffee, to P. & R. to whom A. & M. were jointly indebted, and M. on his private account to a greater amount for advances made at the time of the purchase of the outward cargo. P. & R. collected the bills

So in Brett *v.* Beckwith (*c*), a partnership was held to exist between underwriters, one of whom had agreed to take a joint share

and sold the coffee so remitted, and applied the same to the payment of the debts so due to them from A & M. P & R had notice, if not at the time of the shipment of the outward cargo, certainly before the bills remitted by M were collected, and the coffee sold and converted into money, that B & K were interested in and owned one-fourth of the cargo so sold by M; and B & K demanded of P & R their proportion of the proceeds so remitted by M, after deducting commissions, etc., but P & R refused to pay or deliver the same, alleging their right to retain the same for the payment of the debt due to them from A & M: *Held*, that no partnership existed between A & M and B & K, so far as to render the disposition of the return cargo by M binding, as the act of a partner, on B & K. That there was no agreement constituting a partnership in the purchase of the outward cargo, or to share jointly in the *ultimate* profit and loss of the adventure, and though there might be a partnership, so far as respected the transportation and selling of the outward cargo, for the joint profit and loss of the owners; yet it terminated with the sale of the outward cargo, and their interest in the return cargo was separate and distinct, each being entitled to his respective proportion of it, without any concern in the profit or loss which might ultimately arise; and that P & K not having received the bills in the course of trade, and knowing of the interest of B & K before the bills were paid, had no right to retain their share for the payment of the debt of A & M, but must account to B & K for their proportion. Post *v.* Kimberly, 9 Johns. 470.

Defendants received merchandise on consignment and for sale on plaintiff's account in New Orleans, where all parties resided, and agreed to charge no commission for purchasing or selling, and to allow plaintiff out of the proceeds interest for his advances in buying the merchandise, the profit or loss from the adventure to be equally divided. With defendants' consent the merchandise was shipped to New York, where it was sold at a sacrifice: *Held*, that defendants, whether agents or partners in an adventure, were not liable for the loss. Shaw *v.* Gandolfo, 9 La. Ann. 32.

A man who buys and ships for a firm of another city, whose funds are used, the profits or loss to be divided, and each shipment to be a distinct venture, is not a partner, and the firm can sustain a libel on a policy indorsed to them, without prejudice from his orders or mistakes. Marsh *v.* Northwestern Ins. Co. 3 Biss. 351.

Certain cattle were delivered to plaintiff and two other persons, to be kept for a time, at the expiration of which they were to be sold by defendant. After deducting the first cost of the cattle, defendant was to retain one-half of the remainder of the proceeds, the other half to be equally divided between the plaintiff and the other persons: *Held*, that in this there was no partnership, for there was no community of profit and loss, or of ownership in the subject of the contract. Beckwith *v.* Talbot, 2 Col. 639.

Upon performance of such contract by the three persons named therein, who were to have the care and herding of the cattle, each became entitled to his separate share of the proceeds of the cattle, and each could have his separate action for the failure of the defendant to

(*c*) 3 Jur. N. S. 31, in the Rolls.

of the underwriting risks of the other, paying or receiving sums according to the result of the accounts.

These authorities are sufficient to show that an agreement to share profit and loss, is an agreement for a partnership, although the words partners or partnership do not occur in the agreement. (*d*) Indeed the writer is not aware of any case in which persons who have agreed to share profit and loss have been held not to be partners. (*e*) As will be seen hereafter, the existence of a common stock is not essential to a partnership.

*19 *2.—*Partnership is primâ facie the result of an agreement to share profits, although nothing may be said about losses and although there may be no common stock.*

Agreements to share profits only.

Except in cases specially provided for by statute, an agreement to share profits, nothing being said about losses, amounts *primâ facie* to an agreement to share losses also; (*f*) for it is but fair that the chance of gain and of loss should be taken by the same persons; and it is natural to suppose that such was their intention if they have said nothing to the contrary. It follows from this, that where no statute interferes, an agreement to share profits is *primâ facie* an agreement for a partnership; and accordingly it has been held, that unless an intention to the contrary can be shown, persons engaged in any business or adventure and sharing the profits derived from it, are partners as regards that business or adventure. (*g*)[1]

perform his part of the contract in respect to selling the cattle, and dividing the proceeds of the sale. Beckwith *v.* Talbot, *supra*.

(*d*) See, too, Greenham *v.* Gray, 4 Ir. Com. L. Rep. 501.

(*e*) In Mair *v.* Glennie, 4 M. & S. 240, the expression profit or loss seems to have been used for gross returns. And in Geddes *v.* Wallace, 2 Bligh, 270, the arrangement as to profit and loss did not apply to the person as to whom the question of partnership or no partnership was raised.

(*f*) Greenham *v.* Gray, 4 Ir. Com. Law Rep. 501; Dry *v.* Boswell, 1 Camp. 330; Heyhoe *v.* Burge, 9 C. B. 440, *per* Parke, B.

(*g*) See Pooley *v.* Driver, 5 Ch. D. 458.

[1] Where two or more engage in business, having no mutual interest in the capital invested, and no stipulation for mutual loss, they have been held not to be copartners, though there be an agreement to share profits. Vanderburgh *v.* Hull, 20 Wend. 70; Pattison *v.* Blanchard, 5 N. Y. 186; Fitch *v.* Hall, 25 Barb. 13; Cummings *v.* Mills, 1 Daly, 520: Loury *v.* Brooks, 2 McCord, 421.

Sharing profits is not invariably a test of partnership. The liability of one part-

Indeed, it has often been said, that community of profit is the test of partnership. (*h*) This, however, is not accurate. Whether persons are really partners or not is a

Community of profit as a test of partnership.

ner for the contracts of another is founded on the relation they sustain of each being principal and also agent as towards the other. Harvey *v.* Childs, 28 Ohio St. 319.

In order to constitute a partnership, each person must have an interest in the profits as a principal in the joint business; a mere reception of a portion of the profits is insufficient. Campbell *v.* Dent, 54 Mo. 325; Benedict *v.* Hettrick, 35 N. Y. Superior Ct. 405; Harvey *v.* Childs, 28 Ohio St. 319. See, also, Loomis *v.* Marshall, 12 Conn. 69.

The allegation of a partnership between the master and mate of a vessel is not sustained by proof that the mate shipped for a share of the profits, unattended by other circumstances and without proof of what that share was to be. The Crusader, 1 Ware, 448.

Where three parties enter into an agreement and intrust the investment and management of a certain sum from a common fund in an enterprise to one of them, with a stipulation that they shall share equally in the profits after deducting the amount of the investment, such agreement constitutes a copartnership, and an accounting may be had. Harris *v.* Hillegass, 5 Pacific Coast L. J. 240.

Plaintiff and defendant agreed as follows: Plaintiff was to furnish the capital to carry on the business of manufacturing and selling woodenware, defendant to receive one-third and plaintiff two-thirds of the profits, nothing being said as to any losses: *Held*, that the mere fact that no provision was made in the agreement, whereby defendant was bound to pay his proportion of the losses, if any, did not prevent the parties to the agreement from becoming partners *inter sese*. Munro *v.* Whitman, 15 N. Y. Supreme Ct. 553.

Where, however, by an arrangement between certain parties, one was to furnish money and the other was to buy cattle with it for the market, and the party furnishing the money was to have his capital returned, with 5 per cent. interest thereon, together with one-half the profits on the sale of the cattle, it was *held*, that the parties to this arrangement were not partners, as the one furnishing the money was exposed to no hazard of loss. Adams *v.* Funk, 53 Ill. 219.

An arrangement between A and B for buying and selling on their joint account in the name of A and B, a certain quantity of pork, by which A was to furnish whatever money should be necessary in the business, aside from such advances as might be procured on said pork, and B was to attend personally to the purchase and shipment, and out of the proceeds of the sale, after deducting the costs, expenses and disbursements of every kind, A was to be reimbursed the amount advanced by him, with interest, and the residue, being the net profits, was to be equally divided between them, *held*, to constitute a partnership. Miller *v.* Price, 20 Wis. 117.

An agreement between two parties to carry on a particular business, in which real estate belonging to one of them is to be used, will be held to constitute a partnership, if the owner of the real estate is to be compensated for its use by a percentage of the profits of the business. And it is immaterial that, in the

(*h*) Heyhoe *v.* Burge, 9 C. B. 446; Fox *v.* Clifton, 9 Bing. 799; *Ex parte* Langdale, 18 Ves. 300.

question of intention, to be decided by a consideration of the whole agreement into which they have entered, and ought not to be made

written contract between the parties, such compensation is described as rent. Dalton City Co. *v.* Dalton Manuf. Co. 33 Ga. 243.

Where all the parties had, by a contract entered into, a right to share in the profits of a business, and to use the capital invested, and an inchoate title to it, a partnership exists between them. Vassar *v.* Camp, 14 Barb. 341.

Where two persons agree to burn lime on shares, one to fill a kiln with stone, and the other to burn the kiln and furnish the wood, the lime to be equally divided between them, *held*, that a technical partnership existed between the parties. Musier *v* Trumpbour, 5 Wend. 275.

The owners of a ship agreed to fit her out for a voyage at the joint expense, and for the joint profit, of both: *Held*, that they were partners in the ship, as well as in the cargo; and the ship having been sold, under an authority given to the master, one of the owners, to whose hands the proceeds had come, was allowed to retain for so much as he had paid more than his share of the outfit, repairs, during the voyage, etc., though the other partner had made an assignment of his share before the proceeds of the ship were received. Mumford *v.* Nicoll, 20 Johns. 611.

A & B agreed by parol as follows: A was to erect a steam saw-mill on the land of B, and to manage the same at his own cost, and B was to deliver at the mill, at his cost, all the timber growing on a certain tract of land belonging to B, and they were to divide the profits of the sawing between them. The contract was complied with on both sides, until B's death, and then his administratrix declined to go on with it: *Held*, that this was a co-partnership which was dissolved by B's death. Jones *v.* McMichael, 12 Rich. 176.

A & B agreed to work together in the business of manufacturing marble. B was to furnish the marble, and A was to pay him one-half of the cost of it. B was to board A, and both were to contribute their labor and skill in the business, and the products and avails of the business were to be equally divided between them: *Held*, that they became partners, as between themselves. Griffith *v.* Buffum, 22 Vt. 181.

An agreement between T. a tinner owning a shop, and D. a plumber of large experience, to work together, T. to be allowed out of the profits of the business ten per cent. on his stock invested, and the remainder of the profits to be divided equally between them: *Held*, to constitute a partnership, though the business proceeded in T.'s name, and D.'s share of the profits remained in the concern. Tyler *v.* Scott, 45 Vt. 261.

An agreement whereby W. leased to B. for five years a manufactory; B. to furnish capital and personal labor, the net profits to be shared by the parties, the accounts to be open to the inspection of W. and periodical settlements to be made: *Held*, to constitute a partnership, and a breach of the terms to be a sufficient ground for equitable relief by a decree of dissolution. Wood *v.* Beatt, 23 Wis. 254.

An agreement to purchase and run a ferry boat to be owned by the subscribers, in proportion to the amounts subscribed by each, the toll to be applied to pay expenses, and the balance, if any, to be divided among them *pro rata*, each subscriber to have the right to sell his stock, the purchaser to have all the rights of an original subscriber, and the association to continue as long as a majority of subscribers shall determine, constitutes the subscribers partners. Whitman *v.* Porter, 107 Mass. 522

to turn on one or two only of the clauses in it. (*i*)[1] A good instance of this is afforded by the Irish case of Barklie *v.* Scott. (*k*)

One who had been sent, by Kansas creditors of a merchant of Salt Lake City, to collect their claims, arranged with him, with their consent, to take payment in flour, salt, etc., ship the same to Montana, and there sell the same; but owing to a decline in prices, the venture resulted in a loss: *Held*, that the creditors became partners, and should share the loss *pro rata*. Stettauer *v.* Carney, 20 Kan. 474.

A, being the owner of a zinc-mine, entered into a written agreement with B, by which he agreed to furnish him a certain quantity of ore per annum, for three years, on being paid therefor $10 per ton, and B agreed to provide suitable buildings and machinery for its conversion into paints, etc., and to divide with A the profits of the enterprise, in the proportion of one-fourth to himself and the remainder to A; the cost of the buildings and machinery to be paid out of the profits after a specified time: *Held*, that this constituted A and B partners. Wadsworth *v.* Manning, 4 Md. 59.

An agreement between two persons that each shall furnish a horse to do certain work, and one to do the work and the other pay all the expenses, and divide the earnings equally: *Held*, to constitute a partnership. Gillbank *v.* Stevenson, 31 Wis. 592.

[1] An agreement between two persons to share in the profits of an adventure or concern does not necessarily constitute them co-partners in respect to the concern or adventure from which the profits arise. Rice *v.* Austin, 17 Mass. 197; Newman *v.* Bean, 21 N. H. 93; Lamb *v.* Grover, 47 Barb. 317. See, also, Ferguson *v.* Alcorn, 1 B. Mon. 160.

A mere participation of profits will not make the parties partners *inter sese*, unless such is their intention. Hazard *v.* Hazard, 1 Story, 371. See, also, *ante*, p. 18, note.

M. took a job of finishing a church at a certain price. Afterward, H. agreed to do it with him; the work of each to offset that of the other, and the expense of materials and of other help to be deducted from the contract price, and the balance divided equally between them. They did it accordingly, H. working 30 days more than M. *Held*, that they were not partners, as between themselves, and that H. could maintain assumpsit for the balance due him from M. Hawkins *v.* McIntyre, 45 Vt. 496.

Where a certain portion of the profits of a concern was set apart to pay the debt of A B, by a stipulation in their articles, A B being no party to the articles: *Held*, that A B was not a partner. Drake *v.* Ramey, 3 Rich. 37.

Where an agreement is made between two parties, that one shall furnish a farm with a certain amount of teams and labor, and the other shall manage the farm and give certain labor, the crops to be divided between them, a partnership is not constituted. Blue *v.* Leathers, 15 Ill. 31. See, also, Burdick *v.* Washburn, 36 How. Pr. 468.

A contract, by which one party agrees to furnish wheat to stock a mill, and the other party, with money advanced by the first, to purchase the wheat and convert it into flour, and, after deducting the original cost of the wheat, and two and a half per cent. thereon, to receive the proceeds of the sale of the flour, does

(*i*) See the cases in the next note but one.

(*k*) 1 Huds. & Br. 83. Compare Reid's *case*, 24 Beav. 318, where the father who had transferred shares into his infant son's name was held a contributory.

There a father paid a sum of money as his infant son's share of the capital of a partnership, and it was agreed that during the son's

not constitute a partnership. Johnson *v.* Miller, 16 Ohio, 431.

An agreement by a firm of spice-dealers with an outside party that, in consideration that his representations as to certain means of knowledge shall prove true, and that he will obtain for them, from a congressional committee, information of the rate of duties to be adopted on certain articles, they will purchase with their own means a specified quantity thereof, sell on joint account, and pay him half the net profits, does not create a partnership with him. Strong *v.* Place, 4 Robt. 385.

A contract between the owner of land-warrants and a locator, to locate the warrants for a certain portion of the lands, each party to contribute a share of the expenses, does not create a partnership between them. M'Arthur *v.* Ladd, 5 Ohio, 514.

An agreement by S. to divide his commissions for purchasing cotton with T. in consideration of T's having procured for S. the agency from the principal: *Held*, not to constitute S. and T. partners. Southworth *v.* Thompson, 10 Heisk. 10.

Upon principles settled in Moore *v.* Smith, 19 Ala. 774, and approved in Fail *v.* McKee, 36 Ala. 61, a contract by two parties, by which one agreed to erect and operate a saw-mill for a given time, during which the other was to supply it with logs to keep it running, the lumber sawed, or the proceeds thereof, after sale, to be equally divided between them, does not create a partnership. Robinson *v.* Bullock, 58 Ala. 618.

A contract between a land owner and laborer, by which the latter is to cultivate the former's land for a year, and receive half the crop, does not constitute the parties partners. Halloway *v.* Brinkley, 42 Ga. 226.

An agreement, by the terms of which one party, in consideration of one-half the proceeds, undertakes to farm certain land of the other and to render him regular accounts, each party to furnish one-half the stock, and the former to furnish all the working stock and farming implements, pay the road tax and half the other taxes, constitutes a letting on shares and not a partnership. Brown *v.* Jacquette, 10 Reporter, 318.

An agreement between landlord and tenant, as a part of the consideration for the lease of a farm, that the landlord shall furnish stock enough to eat the hay, oats, and corn raised on the demised premises, the tenant to feed the stock, and upon sale being made, the landlord to be repaid his purchase-money, first out of the proceeds, and the remainder to be equally divided between the parties, does not constitute them partners in respect of stock bought and fed under the agreement. Musser *v.* Brink, 68 Mo. 242.

The occupancy and cultivation by one of the farm of another, under an agreement that the crops raised shall be divided between them in a certain proportion, does not necessarily constitute them co-partners. Donnell *v.* Harshe, 67 Mo. 170.

An agreement, by which one is to furnish a circular saw-mill, and men and horses to keep it in operation, and another is to furnish the logs, and feed for the hands and horses, the lumber to be equally divided between them, such agreement having in view separate and distinct sales by each person on his own account, and no community of profit in the sales, does not constitute a partnership. Stoallings *v.* Baker, 15 Mo. 481.

A being the owner of a number of land-warrants, agreed with B that the latter should locate the warrants, and

minority the profits should be accounted for to the father; it was held that the father was not himself a partner, that clearly not being the intention of the parties to the agreement.

take the agency of the lands as A's attorney, and sell and dispose of the same, paying all necessary expenses of surveying and recording deeds. The title was to remain in A until the lands should be sold, and the first proceeds of sale were to be applied to reimburse to A the cost of the land, with ten per cent. interest; afterwards B was to be reimbursed for expenses paid by him, and the residue of the proceeds were then to be equally divided between A and B. It was further agreed that B was to be the sole agent for selling said lands; that they should all be sold within four years, and if any remained unsold at the expiration of that time, that B should make no claim to any interest in such lands. B further agreed to guarantee to A the return of his capital with interest. By a subsequent contract between the same parties, in reference to other lands, it was agreed that B should "take the agency" of the latter lands upon the terms mentioned in the former contract. A died before the expiration of the four years, and before all of the lands had been sold: *Held*, that the contract did not create a partnership, nor did it invest B with any equitable interest in the land; also, that the relation of the parties was that of principal and agent. Ellsworth *v.* Pomeroy, 26 Ind. 158.

A writing: "Received of G. $2,000, to invest in wool, said G. to receive two-thirds of the net profits on the sale of the wood, and O. one-third. (Signed) O." *Held*, not to establish a partnership *inter sese*, there being no provisions for sharing losses. Ruddick *v.* Otis, 33 Iowa, 402.

In consideration of the right granted him by the plaintiff, to make, use, and sell at the defendant's expense, and on his own account, within the British dominion, certain machines which the plaintiff had invented, and to sell the right to others to make, use and sell the same, the defendant undertook and agreed to procure from the British authorities letters patent to the plaintiff for the machines, and to pay over, quarterly, to plaintiff, one-half the proceeds of all sales made by him: *Held*, not a contract of partnership. Wheeler *v.* Farmer, 38 Cal. 203.

A and B entered into a contract for the manufacture and sale of hat-bodies; B was to furnish the wool and sell the hats, charging nothing for his time in selling; each was to pay half the expense of extra labor, wood, and use and wear of the machinery; A was to manufacture and charge nothing for his time while so engaged; and B, after selling the hats, was to retain from the proceeds the cost of the wool, and the profits, after paying for the wool, were to be equally divided. *Held*, that this did not create a partnership between the parties. Mason *v.* Potter, 26 Vt. 722; and see Tobias *v.* Blin, 21 Vt. 544.

Where a partner disposed of his share of the good-will, and the new firm agreed to allow him a percentage upon the gross sales of the firm: *Held*, that this percentage did not constitute him a member of the new firm. Gibson *v.* Stone, 43 Barb. 235; S. C. 28 How. Pr. 468.

The receipt of a share of the *profits* of a concern does not necessarily create a partnership in the stock as between the parties. McCauley *v.* Cleveland, 21 Mo. 438.

By an agreement between A and B, A was to supply B with stock to be manufactured into cloth, at his mill, on A's account, and B was to manufacture the stock into cloth, and to deliver the cloth to A, for a certain sum per yard. A also

Other illustrations of the same principle are afforded by those cases in which managers and clerks are paid salaries *proportionate to the profits of the busi-

Servants, &c., sharing profits. 20*

engaged that, if B should fulfill his said agreement to manufacture and deliver the cloth, A would pay him one-third part of the net profits of the business: *Held*, that this agreement did not make A and B partners, either between themselves or as to third persons. Denny *v.* Cabot, 6 Metc. 82.

Two parties agreed that for three years one should furnish lumber at a given place and of a certain kind and quantity, and carry the articles manufactured to a railroad station, and the other should manufacture the lumber into doors and blinds, be allowed a certain price therefor, and manage the business of selling them, and divide the profits after payment of the freight and expenses, with the first party: *Held*, that this did not make the parties partners among themselves; that the first party was entitled to his share of the profits within a reasonable time after the other had received the money for sales, without waiting until the expiration of the three years, and might recover it by action for money had and received. Hitchings *v.* Ellis, 12 Gray, 449.

A, having made a contract with B to manufacture certain articles for him, from materials to be furnished by the latter, and B having agreed to pay therefor such an amount as should arise from the profits of the business, together with ten per cent. on the amount of sales of goods manufactured: *Held*, that the terms of the contract did not constitute A and B partners, and that articles manufactured under it, and in the shop of A, were not liable to attachment as his property. Judson *v.* Adams, 8 Cush. 556.

An agreement to purchase goods at a fixed price, and to allow the seller a certain portion of the profit of their re-sale by the purchaser, does not constitute the parties partners. The purchaser is the agent of the seller in respect to the latter's interest in the profits. Donley *v.* Hall, 5 Bush, 549; see Edwards *v.* Tracy, 62 Pa. St. 374.

Where two parties enter into a contract to cut certain timber, one to furnish money, teams and supplies, and the other his own services, the latter to have one-fourth of the profits, and the former to have three-fourths, beside stumpage and interest on his advances: *Held*, that this did not constitute a co-partnership, if one of the parties had not, by the terms of the contract, an unqualified right to dispose of his own share of the lumber, nor any right to dispose of the remainder, on any terms whatsoever. Braley *v.* Goddard, 49 Me. 115. Appleton, J., dissenting.

A made an agreement with B, by which A was to purchase a certain quantity of hides, and deliver them at B's tannery, and B was to tan them at his own expense, being answerable for all damage the hides should sustain while they remained in his care; after which, A was to send them to market and sell them at his own expense, and B was to have one-half of what the hides should bring more than the original cost of them: *Held*, that this agreement did not constitute a partnership between the parties, and that a subsequent agreement, that each party might use such portion of the leather as he desired, keeping an account of it, did not change the case in this respect. Clement *v.* Hadlock, 13 N. H. 185.

So, where a party furnished hides to another to be tanned and returned to the consignor, who was to sell them and to pay one-half the profits to the tanner, after deducting all charges, including a stipulated price for tanning: *Held*,

ness in which they are employed.[1] The act, 28 & 29 Vict. c. 86, which will be noticed hereafter, expressly provides for such

that no partnership was thereby created between the parties, which would enable the tanner, while the leather was in his possession, solely for the purposes of the contract, to sell it, and which would protect a purchaser from him as against the consignor. Fawcett *v.* Osborn, 32 Ill. 411.

The complaint alleged that defendant agreed to manufacture into cheese, at his own factory, milk to be furnished by plaintiff, and to sell the cheese, and pay plaintiff the proceeds, less two cents per pound; that plaintiff delivered the milk, and defendant manufactured it into cheese, which he sold; and that plaintiff's share of the product is a specified sum, which defendant refuses to pay, etc. The answer alleged that the milk so delivered was to be and was mixed with milk belonging to defendant and to other persons, and then made into cheese; that each person furnishing milk was to have his proportion of the cheese made according to the quantity of the milk by him furnished, after paying the cost of manufacturing; that defendant and plaintiff, and others so furnishing milk, were partners therein and in the cheese so made; that plaintiff and other patrons of the factory made defendant their agent to sell said cheese; that he sold it and deposited the money in a certain bank, which failed; that there was no negligence on defendant's part in regard thereto; and that except as above admitted, he denies all allegations of the complaint: *Held*, that the answer did not state any facts showing a partnership, nor otherwise state a defense. Sargent *v.* Downey, 45 Wis. 498. See, also, Hawley *v.* Keeler, 62 Barb. 231.

[1] A party who, without any interest in the property, is by agreement, to receive as compensation for his services, and only as compensation therefor, a certain proportion of the profits, and is neither held out to the world as a partner, nor through the negligence of the owner permitted to hold himself out as partner, is not a partner, either as to the owner or third persons. Burton *v.* Goodspeed, 69 Ill. 237; Commonwealth *v.* Bennett, 118 Mass. 443; Butler *v.* Finck, 10 N. Y. Wkly. Dig. 163; Shepard *v.* Pratt, 16 Kan. 209; Miller *v.* Chandler, 29 La. Ann. 88; Chaffraix *v.* Price, id. 176; Bell *v.* Hare, 12 Heisk. 615; Crawford *v.* Austin, 34 Md. 49; Meserve *v.* Andrews, 104 Mass. 360; Kerr *v.* Potter, 6 Gill, 404; Norwent *v.* Hull, 1 Humph. 320; Voorhees *v.* Jones, 29 N. J. L. 270; Bradley *v.* White, 10 Met. 303; Blanchard *v.* Coolidge, 22 Pick. 151; Smith *v.* Bodine, 74 N. Y. 30; Smith *v.* Perry, 29 N. J. L. 74; Bull *v.* Schubert, 2 Md. 38; Taylor *v.* Sotolingo, 6 La. Ann. 154; Reed *v.* Murphy, 2 G. Greene, 574; Mason *v.* Hackett, 4 Nev. 420; Atherton *v.* Tilton, 44 N. H. 452; Nutting *v.* Colt, 7 N. J. Eq. 539; Burckle *v.* Eckhart, 1 Den. 337; 3 N. Y. 132; Merwin *v.* Playford, 3 Robt. (N. Y.) 702; S. P. Shropshire *v.* Shepperd, 3 Ala. 733; Hanna *v.* Flint, 14 Cal. 73; Hodges *v.* Daws, 6 Ala. 215; Hodgman *v.* Smith, 13 Barb. 302; Dunham *v.* Rogers, 1 Pa. St. 255: Brockway *v.* Burnap, 16 Barb. 309; Good *v.* McCartney, 10 Tex. 193; Ambler *v.* Bradley, 6 Vt. 119; Richardson *v.* Hewitt, 76 N. Y. 55; Miller *v.* Bartlett, 15 S. & R. 137; Sankey *v.* Columbus Iron Works, 44 Geo. 228; Loomis *v.* Marshall, 12 Conn. 69; Webb *v.* Leggett, 6 Mo. App. 345; Clark *v.* Gilbert, 92 Barb. 576. See also, Hall *v.* Edson, 40 Mich. 651; Price *v.* Alexander, 2 G. Greene, 427; Whitehall v. Shickle, 43 Mo. 538.

Participation in the profits of a busi-

cases as these; but independently of that act no partnership subsists between persons thus paid and those who pay them, where

ness is strong presumptive evidence of a partnership in it. This rule and the reason apply as well to a party who receives a sum equal to a certain share of the profits of a business as to a party receiving such share of profits by the name of profits. There are cases, however, where money received may appropriately be regarded as a sum measured by profits rather than as profits themselves; but whether it shall be so regarded depends upon no arbitrary use of phrases, but upon the nature of the contract and the real consideration upon which the money is received. A share of profits paid to agents to secure exertion is not such a participation in profits as to make the agent liable as partner, and in such cases the money so paid is spoken of as a sum equal to or measured by profits, rather than as a share in the profits themselves. Parker *v.* Canfield, 37 Conn. 250. See, also, cases above cited.

Where A, residing at a distance from a factory of cloths, occupied by B, entered into an agreement with B by which A was to furnish a full supply of wool for the factory for two years; B was to manufacture such wool into cloths, in a good and workmanlike manner, and to devote the entire use of the factory to that purpose for such term; and the net proceeds of the cloths, after deducting incidental expenses and the charges of sale, were to be divided so that A should have fifty-five per cent. and B forty-five per cent. thereof; in the manufacture of satinets from such wool, A was to pay fifty-five per cent. and B forty-five per cent. of the cost of the warp; the expense of insurance effected on wool or cloths was to be borne by A and B, in the same ratio as their interest was in the final division of the avails of the cloths; and in case of the destruction of any wool or cloth by fire, the amount to be received from the insurers was to be divided between A and B, according to the loss sustained by each; in an action brought by C for work and labor done in the factory, against A and B as partners, it was held that B had no other interest in the profits than a compensation for his labor and materials by a percentage on the avails of the cloths; and consequently, that A and B were not liable as partners. Loomis *v.* Marshall, 12 Conn. 69.

Where a firm contracts with laborers, agreeing to pay them for their labor one-third the proceeds of the crop, the laborers are not thereby made members of the partnership. The share of a laborer is in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the crop. Christian *v.* Crocker, 25 Ark. 327. See, also, Randle *v.* State, 49 Ala. 14.

A contract, by which the plaintiff agreed to serve the defendant as an overseer for one year, to furnish a certain number of hands and horses, which were to be worked on defendant's plantation with his hands and horses, to defray the expenses of himself, his hands and horses, and to receive one-fourth part of the crop raised as his compensation, does not make the parties partners *inter sese*. Moore *v.* Smith, 19 Ala. 774.

One who is working a plantation on an agreement that he is to receive a fixed share of the crop, irrespective of profits or losses, is not a partner but an employe, and may be discharged for cause. His loss of health, preventing him from superintending the work, is cause justifying a discharge; but he is entitled to compensation for the time prior to the discharge; and a proper mode of computing it is, to di-

it appears from the whole agreement that partnership was not intended. (*l*)

v de the total value of the crop by the number of days in the year, and allow him to share according to the number of days he served. Jeter *v.* Penn, 28 La. Ann. 230.

A and B having entered into a contract with a turnpike corporation, to make and complete a certain road, afterwards made an agreement with C "to let him have a share of the profits, if any, in making the second ten miles of the road, in proportion to the help he afforded in completing the same; the one-half of it to be taken from A's part, and the other from B's part." *Held*, not to create a partnership between A, B, and C, but a mode of paying C for his help and labor. Muzzy *v.* Whitney, 10 Johns. 225.

In an action for damages for a breach of contract, the complaint alleged that, at a certain date, the plaintiff and the defendant had executed a written contract, by the terms of which the defendant was to furnish all the buildings, machinery, power and capital, and the plaintiff was to perform all the labor necessary for manufacturing all the raw material of a certain kind, which could be purchased at a certain place by the plaintiff, at a price not exceeding the ruling market price at a certain other place; that such contract should terminate at a specified time; that the defendant should make all sales of the manufactured article, and collect the pay therefor; and that he should pay to the plaintiff, as compensation for his services, a certain proportion of the net profits which should be realized *Held*, that the parties to the contract did not thereby become partners. Boyce *v.* Brady, 61 Ind. 432.

Although the amount which a seaman is to receive for his labor is made to depend upon the amount of fish caught, still, he is not on that account a partner in the enterprise, and need not join any of the crew with him as plaintiffs in an action to recover his share of the proceeds. Holden *v.* French, 68 Me. 241. See, also, Coffin *v.* Jenkins, 3 Story, 108; Baxter *v.* Rodman, 3 Pick. 435.

An action at law is proper to recover for services rendered a co-partnership, under an agreement providing for a payment of a share of the net profits of the firm business as a compensation for the services; the fact that an accounting is necessary to ascertain the amount of the compensation does not require an equitable action, and plaintiff, not being a partner, could not bring such an action; an accounting is proper in the action at law, and the introduction of the requisite evidence does not change the nature of the action. Smith *v.* Bodine, 74 N. Y. 30.

(*l*) *Ex parte* Tennant, 6 Ch. D. 303; S. C. 25 W. R. 854; where a father claimed to be a partner with his son: Ross *v.* Parkyns, 20 Eq. 331; Rawlinson *v.* Clark, 15 M. &. W. 292; Stocker *v.* Brocklebank, 3 Mc. & G. 250; Shaw *r.* Galt, 16 Ir. C. L. 397; Radcliffe *v.* Rushworth, 33 Beav. 484, where there was a holding out and a deed executed by the alleged partners, in which they were described as carrying on business together. See, also, Geddes *v.* Wallace, 2 Bligh, 270. In R. *v.* MacDonald, 7 Jur. N. S. 1127, a servant, paid by a share of profits, was convicted of embezzlement, which he could not then have been if he had been a partner. In Withington *v.* Herring, 3 Moo. & P. 30, an agent paid by a salary and a share in the profits was thought to be a partner, but the question was not decided.

If the servant sharing profits has also an interest in the partnership capital or stock, this additional circumstance goes far to show that a partnership was, in fact, intended. (*m*)

An agreement between W. and R. dated October 2, 1865, provided that W. should enter into and carry on for three years, from April 17, 1865, the business of manufacturing oils and candles, "under the name, style and firm" of the X. company; furnish the necessary capital to a limited amount, let the company have the use of his coal land and mining apparatus, with the right to take coal, for which he was to be paid by the company a certain sum per ton, and be allowed interest on the capital stock invested in said company; that R should be employed as the general agent and manager of said business, devote himself wholly thereto, receive "in payment for his said services" a certain sum per year, and one-half the net profits of the business, let to the company his oil works, tools and apparatus at a certain rent, and allow to the company, free of charge, the benefit of all trade-marks and patents used by him; that annual settlements should be made, and all sums due thereon to R. should be paid, or if not paid, credited to him and interest allowed thereon; that "all the operations of the late limited partnership of R. since April 17, 1865, are to be considered done and performed under this agreement, so far as the business of the company is concerned, and this agreement relates back to said April 17." R. in 1867, brought an action of contract against W. declaring on this agreement and alleging that W. excluded R. from the management and profits of the business, refused to make annual settlements; and although continuing the business on the premises and with the tools of R. and making large profits, refused to recognize that R had any rights under the agreement: *Held*, a partnership and the action not maintainable. Ryder *v.* Wilcox, 103 Mass. 24.

A and B entered into an agreement, in writing, by which the former agreed to employ the latter as salesman and clerk in his store, and allow him for his services one-fourth of the net profits of the business, and which further declared that thereby the said B was not made a partner in trade of the said A, but that the allowance of one-fourth of the net profits, after deducting expenses, etc., was a compensation for the services of the said B, in lieu of clerk hire: *Held*, that however B might be held liable as to third persons, he had none of the rights and equities of an actual partner, and therefore, had no more right to call for the interposition of a court of equity, on the ground of lien, than any other creditor of A. Kerr *v.* Potter, 6 Gill, 404.

Owner of a vessel, which the master runs for a share of the net profits, should not join in an action for freight due on an agreement in which the master only was known to the shipper. Boardman *v.* Keeler, 2 Vt. 67.

A contractor for carrying the mail agreed with a sub-contractor that he should perform one-half the service, and be entitled to one-half the compensation: *Held*, that this agreement did not constitute a partnership between the parties. Wilkinson *v.* Jett, 7 Leigh, 115.

B. and J. having chartered certain vessels to proceed to the Lobos Islands for guano, agreed by contract, in consideration of valuable services rendered

(*m*) See Reid *v.* Holinshead, 4 B. & C. 867; *Ex parte* Chuck, 8 Bing. 469; Gilpin *v.* Enderby, 5 B. &. A. 954.

It is not, however, essential to the existence of a partnership, that there shall be any joint capital or stock. If several persons labor together for the sake of gain, and Partnerships in profits only.

"them," in respect to the obtaining access to and procuring said guano, by K. "to pay him a sum or sums of money equal to the quarter part of the net profits, on each and every vessel so chartered:" *Held*, that this contract did not make K. a partner in this enterprise. Benson *v.* Ketchum, 14 Md. 331.

The bankrupt entered into a contract with one S. by which he undertook to carry on the butchering business for S as his agent and salesman. The contract provided that the "offal, feet, and the commission on hides and the usual slaughter-house perquisites" were to go to S. and the bankrupt was to receive in lieu of wages, all he could make over and above the current price of cattle bought, after deducting all expenses. It was also provided that the bankrupt should account daily with S. and pay over to him all moneys received until S. was fully reimbursed for the stock and expenses: *Held*, that the agreement did not create a partnership. *In re* Blumenthal, 18 Bk. Reg. 555.

An arrangement between two persons, whereby one delivers to the other certain hay, which the latter agrees to transport to another market, and there sell the same if he can, at not less than a given price per ton, of which he is to receive a specified sum per ton for his freight and trouble, and to pay over the balance to the other party; and if he sells at a higher price than the minimum price named, the excess is to be divided equally between them; and if he fails to make sale he is to store the hay for the other party, and to wait for his freight till the hay is sold, does not constitute the parties partners. Morrison *v.* Cole, 30 Mich. 102.

Where A, B and C became partners under the written stipulation that C might elect to receive a certain sum of money, as salary, in lieu of a third of the net proceeds of the business: *Held*, that the relation between A and B was not disturbed by the election of C to receive the salary. Bidwell v. Madison, 10 Minn. 13.

One hiring or renting property — a still, tubs, etc., in this case—may contract for speculative compensation; and this will not constitute him a partner. England *v.* England, 57 Tenn. 108.

An agreement by a landlord with his tenant to take a share of the profits of the demised premises, by way of rent, does not constitute a partnership between them, so as to prevent an action at law by the landlord against the tenant for the rent. Perrine *v.* Hankinson, 11 N. J. L. 181.

The fact that a negro trader, in whose sales house slaves are exhibited for sale and sold by the owner, charges half commission for the use of his house, does not constitute him a partner with the owner in the sale. Dillard *v.* Scruggs, 36 Ala. 670.

By an agreement between the parties, dated February 11, 1861, reciting that they had agreed to continue the connection between them for three years from January 1, 1861, in the same way as theretofore, it was stipulated that the arrangement made with the plaintiff was to share the profits or losses of the defendant's business in the above mentioned time, at the rate of 17½ per cent.; but that it was not to convey to the plaintiff the right of partnership in the defendants' firm, of signing the firm name, etc., and that he was to superintend as salesman the department of general dry goods; that the plaintiff should be at liberty to draw $2,500 a year in monthly installments for his personal and other expenses; that the capital then standing

of dividing that gain, they will not be partners the less on account of their laboring with their own tools.[1] Thus in Fromont *v.* Coupland (*n*), two persons who horsed a coach and divided the profits were held to be partners, although each found his own horses, and the other had no property in them.

Fromont *v.* Coupland.

to his credit on the books of the firm, as well as the surplus of profits for the next three years, if any, should remain in the business, to his credit, at seven per cent. interest during the term of the agreement; that in case of the death of either of the defendants during the three years, the agreement was to remain in force with the surviving partner if he should continue the business, and that in case of the death of the plaintiff, the books of the firm might be balanced either on the 31st of December, or on the 30th of June, whichever date might follow after his death, and the balance due him should be paid to his representatives: *Held*, not to constitute a partnership *inter sese*, however it might be as to third persons. Osbey *v.* Reiner, 49 Barb. 265.

A and B made an agreement in writing, by which B was to furnish a vessel and cargo, and A was to take charge of the same and prosecute a certain voyage upon the following terms: "Monthly wages, $50, and one-fifth interest in the voyage, he furnishing $1,000 towards the one-fifth." A received and acted upon a letter of instructions from B, saying, "Your interest in the vessel and cargo is one-fifth part." Other voyages were made with the same and another vessel, and A received and acted upon another letter of instructions from B, saying: "For your services you are to receive $50 per month, and one-fifth interest in all the vessels and cargoes I may send to you." The accounts of all the voyages were kept as partnership accounts, which A knew. At the end of the transactions A claimed one-fifth of the property: *Held*, that A and B were partners. Julio *v.* Ingalls, 1 Allen, 41.

[1] A partnership in profits may exist without including title in all the partners in the property out of which such profits are made. Moore *v.* Huntington, 14 N. Y. Supreme Ct. 425; McCrary *v.* Slaughter, 58 Ala. 230, *ante*, p. 18, note. See, also, Hankey *v.* Becht, 25 Minn. 212. See, however, Dwinel *v.* Stone, 30 Me. 384; Chase *v.* Barrett, 4 Paige, 148, *infra*.

A father conveyed to his three sons all his estate, in consideration that they should pay his debts then existing, and give him and his wife a life support. One of the sons took from the others a power of attorney to hold the property, manage the farm and fulfill their joint promise, and by virtue thereof paid the debts, furnished the life support, and carried on the farm, supposing that if it should yield a profit over his expenditures, they should share it equally, otherwise share the loss: *Held*, that if there was a partnership created between them, it was at most only in the profits and losses of carrying on the farm. Howe *v.* Howe, 99 Mass. 71.

A contract provided that K. should furnish and replenish a stock of merchandise which N. was to take charge of and sell, deducting from the proceeds the expenses of the business and a certain fixed sum for himself, the profits of the business to be divided equally, and N. to take his share thereof, at the expiration of the contract, out of the merchandise on hand: *Held*, that the contract created a partnership, notwithstanding a stipulation that the goods were to remain the property of K. and that K. could not

(*n*) 2 Bing. 170. See, too, Lovegrove *v.* Nelson, 3 M. & K. 1.

So, in French *v.* Styring (*o*), where two co-owners of a race-horse agreed to share its winnings and the expenses of its keep, although there was some doubt as to whether they were partners or not, the Court had no hesitation in admitting that they might have been partners in the profits although not in the horse itself. (*p*)

French *v.* Styring.

*The ordinary agreement between publishers and authors, to the effect that the author shall contribute the manuscript, and the publisher shall, in the first instance, defray the ex- *21

maintain replevin for the goods until after a settlement. Kuhn *v.* Newman, 49 Iowa, 424.

Equity having exclusive jurisdiction of partnership settlements, evidence to show that N. had no interest in the merchandise, because no profits had accrued, was not admissible in the action of replevin. Kuhn *v.* Newman, *supra*.

B. and H. sole managers of the business of a brewing, malting and distilling company, received for their services five per cent. on all sales, which commission, by an arrangement between themselves, they divided, three per cent. to H. and two per cent. to B. They paid bills rendered to them in the firm name of B. & H. and in order to raise money to pay for purchases made in the name of B. & H. they gave their joint and several notes signed in their individual names: *Held*, to be a partnership. Heise *v.* Barth, 40 Md. 259.

Where A B being the owners of several farms in 1827, entered into articles of agreement with three of his sons and his son-in-law, wherein it was agreed that the three sons and son-in-law should work and carry on the farms owned by A B, for the term of five years, in such manner as might be thought by A B most discreet and prudent, and should put on the same all such implements of husbandry as they owned, and A B agreed to put on to the said farms, for the use thereof, all such teams and implements of husbandry as he owned; and it was further agreed that other teams and implements of husbandry which might be necessary should be purchased from the products of the farms, and that each of the parties should have his proper living and expenses out of such products; and A B also agreed that at the expiration of said term of five years, his said three sons and his son-in-law should have one-half of his personal property and one-half of the products of the farms; and A B further agreed that in case the three sons and son-in-law faithfully performed the agreement on their part, he would convey to them by deed in fee simple, one-half of all such farms; and at the time of making the agreement A B owned considerable personal property; and his son-in-law was then in ill health and unable to work until his death, which took place a few weeks thereafter: *Held*, the agreement did not constitute the parties co-partners, so as to entitle the representatives of the son-in-law to a share of the property. Chase *v.* Barrett, 4 Paige, 147. See, also, Dwinel *v.* Stone, 30 Me. 384.

(*o*) 2 C. B. N. S. 357; *infra*, P. 25.

(*p*) The dictum in Syers *v.* Syers, 1 App. Ca. 181, to the effect that a partnership in profits is a partnership in the assets by which they are made, is by no means universally true. See *infra* note (*t*).

penses of publication, and repay himself out of the proceeds of the sale of the work, and that then the profits shall be divided, furnishes another instance of a partnership confined to profits only. (*q*)

Again, it frequently happens that one person has property and another skill, and that they agree that the latter shall have the control of the property for the benefit of both, and that the profits shall be divided.[1] In such cases it may be difficult to say whether partnership is or is not created. In Stocker v. Brocklebank (*r*), it is clear that no partnership was intended and none was created; in the Irish case of Greenham v. Gray (*s*) it was thought that the whole agreement could only receive a reasonable construction by holding a partnership to exist, and a partnership was held to exist accordingly, although the mills, and machinery, and buildings, by means of which the business was carried on, clearly belonged to one partner only.

Other instances of partnership in profits, although there is no community of interest in the capital or stock producing them, will be noticed when the subject of partnership property is examined. (*t*)

*22 *3.—*Partnership is primâ facie the result of an agreement to share profits, although community of loss is stipulated against.*

Persons who agree to share the profits of an adventure, to the

(*q*) See Gardiner *v.* Childs, 8 C. & P. 345; Reade *v.* Bentley, 3 K. & J. 271, and 4 Ib. 656; Wilson *v.* Whitehead, 10 M. & W. 503; Gale *v.* Leckie, 2 Stark, 107; Venables *v.* Wood, 3 Ross L. C. on Com. Law, 529. This last case is an authority for the proposition that authors and publishers are not partners at all, and *qu.* whether this is not the correct doctrine?

[1] See Holt *v.* Kernodle, 1 Ired. L. 199; Simpson *v.* Feltz, 1 McCord Ch. 124; Dob *v.* Halsey, 16 Johns. 34; Gregg Township *v.* Half-Moon Township, 2 Watts, 342; Potter *v.* Moses, 1 R. I. 430; Winship *v.* Bank of United States, 5 Pet. 529; Tibbatts *v.* Tibbatts, 6 McLean, 80; Bearce *v.* Washburn, 43 Me. 564; Wood *v.* Vallette, 7 Ohio St. 173.

(*r*) 3 Mc. & G. 250.

(*s*) 4 Ir. Com. L. Rep. 501. The real truth here seems to have been that the plaintiff intended to create a partnership, whilst the defendant did not.

(*t*) In Meyer *v.* Sharpe, 5 Taunt. 74, the distinction between an interest in profits and an interest in the goods by the sale of which those profits were to be produced, was held to be clear and manifest. See, too, Smith *v.* Watson, 2 B. & C. 401.

expenses of which they contribute, are *primâ facie* partners, although they stipulate that they will not be liable for losses beyond the sums they engage to subscribe. (*u*)

Sharing profits but not losses.

The inference that where there is community of profit there is a partnership, is so strong that, even if community of loss be expressly stipulated against, partnership may nevertheless subsist. In Coope *v.* Eyre (*x*), Lord Loughborough is reported to have said, "In order to constitute a partnership, communion of profits and loss is essential." But there is nothing to prevent one or more partners from agreeing to indemnify the others against loss, or to prevent full effect from being given to a contract of partnership containing such a clause of indemnity. (*y*)[1]

Stipulations against community of loss.

The true effect of such a complex agreement would, it is apprehended, be to entitle each of the partners to a share of the excess of the returns over the advances, while some of the partners would be entitled to be indemnified by the others for all losses *beyond the advances*. If this were not the result of the agreement, and if the persons indemnified were indemnified not only against losses beyond the advances, but also against the loss of the advances themselves, the contract would lose its character of a contract of partnership, and become a contract of loan. (*z*)

Contracts of loan compared with contracts of partnership without community of loss.

Whilst the laws against usury were in force, a tendency was sometimes manifested to treat what was in truth a loan at usurious interest, and therefore illegal, as a contract of partnership and therefore legal. (*a*) This view of the transaction *had the merit of apparently holding the parties to their bargain; but in truth the bargain to which *23

Usurious loans confounded with partnerships.

(*u* Brown *v.* Tapscott, 6 M. & W. 119.

(*x*) 1 H. Blacks. 49.

(*y*) See Bond *v.* Pittard. 3 M. & W. 357; Geddes *v.* Wallace, 2 Bligh, 270.

[1] Although the perception of profits renders one liable as a partner to third persons, the partners may stipulate, as between themselves, that one shall not be liable for the debts of the firm. Pollard *v.* Stanton, 7 Ala. 761.

A stipulation, exempting a partner from losses for a fair and just equivalent, is valid as to the partners *inter se*. Consolidated Bank *v.* State, 5 La. Ann. 44.

(*z*) See Pothier, Contrat de Société, §§ 21 & 22. Compare Pooley *v.* Driver, 5 Ch. D. 458, noticed *infra*. See, also, *Ex parte* Delhasse, Law Rep. 7 Ch. D. 511, where the agreement was that no partnership should be created. In this case the so-called loan was more clearly risked in the business than in Pooley *v.* Driver.

(*a*) See Bloxham *v.* Pell, cited 2 Wm. Blacks. 999; and compare Morse *v.* Wilson, 4 T. R. 353, and 7 Byth. Conv. p. 163, edit. 2.

they were held was very different from that which they themselves had contemplated; and by treating such transactions as partnerships and not as loans, an amount of confusion was introduced into this branch of the law which even the repeal of the usury laws failed to remove. The leading cases on this subject are Gilpin *v.* Enderby (*b*), and Fereday *v.* Hordern. (*c*) They decided that a loan of money on the terms that the lender should share the profits of the borrower, rendered the lender liable to third persons, as if he were a partner with the borrower; and that by reason of such risk the loan was not usurious. The judgments in these cases show that the borrower and lender were regarded by the court as partners *inter se.*

These cases, however, cannot now be relied upon; for, as will be seen hereafter, the mere fact that a lender of money shares profits with the borrower will not make the lender liable as a partner; and as between the borrower and the lender the question of partnership or no partnership turns on the real agreement between them. (*d*)[1]

(*b*) 5 B. & A. 954.

(*c*) Jac. 144; see, also, *Ex parte* Briggs and *Ex parte* Notley, 3 D. & Ch. 367.

(*d*) See the cases of servants sharing profits, *ante*, pp. 19, 20.

[1] An agreement was made by manufacturers and a banker, whereby the latter was to furnish the former money wherewith to manufacture as many articles as they might think safe and profitable, they to return to him, in any event, his advances, and if the adventure proved profitable, one-third of the profits in lieu of interest on the money loaned, but no provision was made for his bearing any expense or loss, nor was any time fixed for the termination of the adventure: *Held*, that this did not constitute a partnership. Lintner *v.* Millikin, 47 Ill. 178. See, also, Emmons *v.* Westfield, 97 Mass. 230, where stock and materials were advanced by a capitalist to the manufacturer; also, Gallop *v.* Newman, 7 Pick. 282; *In re* Ward, U. S. Dist. Ct. W. D. Tenn. 8 Reporter, 136; Smith *v.* Garth, 32 Ala. 368; Richardson *v.* Hughitt, Ct. of Ap. of N. Y. 8 Reporter, 177; S. C. 76 N. Y. 55; Hart *v.* Kelly, 83 Pa. St. 286; Everett *v.* Coe, 5 Den. 180. See, also, *post*, p. 34, note.

A loan was made for two years, with interest payable quarterly, at a rate above six per cent., and to be made equal to one-fourth of the profits of the borrower's business at the end of the term: *Held*, not to constitute the lender a partner with the borrower. Lord *v.* Proctor, 7 Phil. 630.

A & B of the one part, and C, D, E & F of the other, made an agreement in writing, whereby A & B sold to C the exclusive right to manufacture and sell a certain article secured by letters patent, together with all the stock and fixtures then on hand pertaining to the business, in consideration that thirty-seven and one-half per cent. of the net profits realized should be paid to them; and in order that profits might arise out of it, D, E & F were to furnish $15,000 as capital for carrying on the same, A & B agreeing that they would neither make nor sell the said article, nor in any wise interfere with the management of the business, which was agreed should be left exclusively with C as superinten-

At the same time, even now a person who, is really a partner, although dormant (*i. e.*, a partner taking no part in the Dormant partners.

dent, who was to receive a certain stipulated salary and 25 per cent. of the net profits for his services, the party of the second part guaranteeing to A & B the payment of said 37½ per cent. after all expenses should be paid, such expenses to include 20 per cent. on the capital furnished by D, E & F, to be paid to them for the use of the money, and which capital it was agreed they might at any time withdraw with the consent of C: *Held*, that this agreement did not constitute a partnership between A & B and the other parties. Smith *v.* Vanderburg, 46 Ill. 34.

Agreement under seal between A and B, by which B was to loan A $5,000 for one year, or endorse his note for that amount for that time, and also indorse his notes to an additional amount not exceeding $2,000, if B thought such sums required for A's business. For this A was to pay B ten per cent. of his net business profits of the year, and two per cent. of his net profits for each $1,000 indorsed for him over said sum of $5,000. A also agreed to conduct his business to the best advantage, and to keep accurate accounts thereof, to be at all times open to B's examination: *Held*, an executory agreement, which, if carried into effect, would make A and B co-partners, neither as between themselves nor as to third persons: *Held*, further, that the lenders, having no voice in the management of the business, and no interest in the capital, the agreement was for a loan of money or credit in which a percentage of profits took the place of interest: *Held*, further, that such contract did not, according to the later English cases, create a partnership at common law. Boston & Col. S. Co. *v.* Smith, 22 Alb. Law Jour. 232.

Where money is loaned for the benefit of a business, and is to be refunded absolutely, without regard to the profits; the fact that the lender is to receive a share of the profits, to apply on the indebtedness, does not make him liable to creditors as a partner; to have that effect, the payment of the advancement must depend upon the profits. Eagar v. Crawford, 76 N. Y. 97; see, also, cases next above cited.

Defendant C. advanced to defendant G. money to purchase the stock and fixtures of a business, which G. stated he could pay soon. C. was secured by chattel mortgage upon the property, conditioned that the sum loaned should be paid on demand, and G. agreed to pay over to him one-half the net receipts of the business. In an action by a creditor of G., who sought to charge C. as a partner: *Held*, that C. could not be held liable; that the legal presumption was that the share of receipts so paid over was to be applied in payment of the loan. Eager *v.* Crawford, 76 N. Y. 97.

When a party advances money to another, and for the use of the money he is to share in the profits of the transaction, besides the interest upon the sum loaned, he cannot be held liable as a partner to third persons who deal with the borrower of the money. Curry *v.* Fowler, 10 N. Y. Wkly Dig. 165.

B. L. & L., by an instrument dated July 1, 1860, reciting that they composed the firm of S. & Co., agreed that as H. A. S. had loaned them $100,000, to be used as capital for the term of two years, and subject to all the risks of their business, so far as creditors of the firm were concerned, they would pay him interest at the rate of 7 per cent., and that as a bonus for the good will of the business (in which he had formerly been a partner), they would allow him half-yearly 1 per cent. of the gross sales of the firm, "he having no interest in

management of the partnership)[9] will be treated as such, although he may have endeavored to conceal his true character under the cloak of being a mere lender of money. (e) Whether a person advancing money and sharing profits is a creditor or a

the commission, guarantee, or profit and loss, and in no wise a partner, or to be allowed to have any part or control in the business of the house:" *Held*, that H. A. S. was not a partner with S. & Co., nor liable as such to their creditors. Gibson *v.* Stone, 43 Barb. 286.

Participation in the profits is, however, *primâ facie* strong evidence of a partnership in it. *In re* Ward, 8 Reporter, 136.

On the other hand, where defendant H. loaned to the firm of P. & Co. $2,000, to be used in the business for one year, under an agreement that he was to receive one-third of the profits, which were to be settled half-yearly, and at the end of the year, if he did not conclude to become a partner, he was to be repaid his $2,000 out of the concern: *Held*, that the money so invested was used by the firm for the benefit of H.; that he had an interest in the profits as such, not as a measure of compensation, but as a result of the capital and industry; and that as to the creditors of the firm, he was a partner, and jointly liable with the others for the partnership debts. Leggett *v.* Hyde, 58 N. Y. 272.

(e) See Pooley *v.* Driver, 5 Ch. D. 458, noticed, *infra*, § 2.

[9] A dormant partner is one whose name is not mentioned in the title of the firm, or embraced in some general term, as company, sons, &c. Jones *v.* Fegely, 4 Phil. 1. See, also, Waite *v.* Dodge, 34 Vt. 181.

A partner is not to be deemed dormant because his name does not appear in the firm style, nor is it necessary to constitute one a dormant partner that his membership is universally unknown. It is sufficient if he is not an ostensible partner. Metcalf *v.* Officer, 2 Fed. Rep. 640.

A dormant partner is liable for all the partnership debts contracted during his connections with the firm. Lea *v.* Guice, 21 Miss. 656; Lindsey *v.* Edmiston, 25 Ill. 359; Bigelow *v.* Elliott, 1 Cliff. 28.

So, whether credit is given exclusively to the ostensible partner or not. Lea *v.* Guice, *sup.*

This liability is founded on his participation in the profits. Lea *v.* Guice, *sup.*

A secret partner who was interested in some transactions of his co-partner, and not in others, is responsible for a transaction at which he is shown to have been present, and in which he participated. Lindsey *v.* Edmiston, 25 Ill. 359.

A secret partner is liable upon a note of the partnership, independent of any charge or proof of a fraudulent collusion between the partners to conceal his liability. Bradshaw *v.* Apperson, 36 Tex. 133; St. Armand *v.* Long, 25 La. Ann. 167.

In a suit against G. for goods alleged to have been sold and delivered by the plaintiff to said G. and his partners, the following facts were established: B. and C. prior to 1875, had been engaged as partners under the firm name of B. & C. ostensibly in carrying on a retail store in Baltimore. Upon a credit which they had established in this manner, they purchased goods during certain months of said year, from wholesale dealers in different cities, and among them the plaintiff, upon credit and ostensibly for their said retail business. These goods were shipped to Baltimore and deposited in warehouses, whence said B. & C. secretly, and under cover of a number of fictitious names, shipped them, in the original packages, to the defendant G.

dormant partner is often a very difficult matter to determine, and can only be decided by a careful study of the whole agreement between the borrower and the lender, and especially by examining what rights are conferred on or taken from the person making the advance.[s] The right of a lender is to be repaid his money with

who used said fictitious names in receiving, re-shipping and selling said goods: *Held*, that at the time the plaintiff sold the goods to the firm of B. & C. the defendant G. was a member of said firm, and therefore liable, *ex contractu*, as a member of said firm, to the plaintiff for the goods by him sold to said firm, though he may not then have known that said G. was a member of it; as a dormant partner, when discovered, is liable for the debts of the firm, the same as an ostensible one. Gilmore *v.* Merrell, 62 Ind. 526.

A written acknowledgment, signed and given to the complainant by the respondent, that they had on that day purchased the quantity of land described in it, the complainant paying for the same the sum of three thousand dollars, for which the respondent received the deed, but acknowledging and agreeing that the complainant was to be paid back his three thousand dollars with interest, and receive as his share of the profits, if any there should be, two-thirds, and he one-third, and if a loss should be sustained, they were to bear it in the said proportion; and in consideration of his receiving the deed, he executed that day a judgment-bond for three thousand dollars, for which he held himself accountable until the property should be sold, when the proceeds of such sale should go to pay off said bond. And it was also at the same time agreed between them, though not stated in the acknowledgment, that in the meantime, judgment should not be entered on the bond and which was not done until five years and three months thereafter, nor until after most of the land had been sold, and the agreement had been denied and repudiated by the respondent. The land referred to lay in the city of Wilmington, and the latter proceeded soon after the purchase of it, to have it surveyed and laid off into city lots, and to erect houses and make other improvements upon them at his sole expense, and from time to time to sell and convey the same as his own property: *Held*, in the absence of any direct and positive evidence to the contrary, that the agreement constituted a valid and *bonâ fide* contract of partnership of a special character between them, and that the three thousand dollars paid by the complainant for the land, was an advance of capital by him on account of the partnership, and was not a usurious loan of that amount of money to the respondent, under a false and fraudulent pretense of such a partnership contract, for the purpose of evading the prohibition of the statute against usury, without adequate hazard or risk of the principal, or any part of it, in the undertaking; nor a grossly inequitable, hard, or unconscionable contract for exorbitant profits on the amount of money embarked by him in it, without adequate risk, or hazard of incurring any loss by it; and that therefore the complainant was entitled to receive, not only the amount of the bond, with interest, but the respondent was bound to account to him for two-thirds of the net profits realized from the sale of the lots, independent of the improvements made upon them by him, and of the increased value of the land still retained and held by him. Plunkett *v.* Dillon, 4 Houst. 338.

[s] Where A gave B money to purchase

such interest or share of profits as he may have stipulated for; and his right to a share of profits involves a right to an account and to see the books of the borrower. If he stipulates for more than *24 this (*e. g.*, for a right to control the * business or the employment of the assets, or to wind up the business), or if his advance is risked in the business, or forms part of his capital in it, he ceases to be a mere lender and becomes in effect a dormant partner. In illustration of these remarks, reference may be made to Mollwo, March & Co. *v.* Court of Wards (*f*) on the one hand, and Pooley *v.* Driver (*g*) on the other. (*h*) In both there was an advance of money and a stipulation for a share of profits; and in both the lender had unusual powers; but in the former case the court came to the conclusion that a loan on security was all that was really intended; whilst in the latter the Court considered that the lender was really a dormant partner, although he had done his best to avoid the liabilities incident to that position.

4—*Partnership is not the result of an agreement to share gross returns.*

Sharing gross returns.

Although, as has been already pointed out, those who share gross returns share profits, if any there be, for gross returns include profits, and although at common law an agreement to share profits is *primâ facie* an agreement for a partnership, yet it has long been held that a partnership is not the result of an agreement to share gross returns. (*k*)

Gibson v. Lupton.

If several persons make advances for a common object, and agree to share the gross returns in proportion to their advances, this does not create such a community of interest in profit or loss as to make such persons partners. Thus, in Gibson *v.* Lupton (*l*), where two persons joined in the purchase of

sheep with, and stated that he was to have half the profits, but to have no interest on his money if there were losses, and declared to a witness that he and B were partners,—such transactions do not constitute a loan, but the parties thereto are partners as to the whole subject in controversy. Newbran *v.* Snieder, 1 W. Va. 153.

(*f*) L. R. 4 P. C. 419.

(*g*) 5 Ch. D. 458.

(*h*) They are referred to more at length hereafter, in § 2.

(*k*) See the preliminary remarks, *ante*, pp. 16, 17, and note.

(*l*) 9 Bing. 287. See further, as to joint purchasers, Coope *v.* Eyre, 1 H. Blacks. 37; and Hoare *v.* Dawes, 1 Doug. 371, and *post*, § 6.

wheat, with the intention of paying for it and dividing it equally, it was held that they were not partners. So, if two workmen agree to divide their wages, that, *per se*, does not make them partners. (*m*) But the strongest illustrations of this doctrine are afforded by those cases in which co-owners of chattels * divide the earnings of the chattel. The distinction between co-owners and co-partners will be noticed hereafter, but as an instance in which co-owners have been held not to be partners, although they agreed to divide the returns obtained by the use or employment of the thing owned, reference may be made to French *v.* Styring. (*n*) There the plaintiff and defendant were entitled in common to a race-horse. It was agreed that the plaintiff should keep, train, and have the management of the horse; that thirty-five shillings a week should be allowed for the expense of his keep; that the plaintiff should pay the expenses of entering the horse and conveying him to the different races; and that one-half of the horse's keep and other expenses and his winnings should be equally divided between the plaintiff and the defendant. This agreement was held not to create a partnership. It was no more a partnership than if two tenants in common of a house had agreed that one of them should have the general management and provide funds for necessary repairs, so as to render the house fit for the habitation of a tenant, and that the net rent should be divided amongst them equally. (*o*)

Co-owners sharing gross returns.

*25

French *v.* Styring.

So, where two persons were respectively lessee and manager of a theatre, and they shared the gross receipts equally, the manager paying the expenses out of his share, it was held that no partnership subsisted between them. (*p*)

Again, in whaling voyages the sailors are usually paid a certain proportion of the produce of the oil obtained, but even before the act of 28 & 29 Vict. c. 86, they were not therefore partners, either with each other or with their employers. (*q*)[1] In such cases as this, partnership was clearly not in-

Wages payable by a share of produce.

(*m*) See Finckle *v.* Stacey, Select Ca. in Ch. 9.

(*n*) 2 C. B. N. S. 357.

(*o*) See the judgment of Willes, J., 2 C. B. N. S. 366.

(*n*) 2 B. B. N. S. 357.

(*o*) See the judgment of Willes, J., 2 C. B. N. S. 366.

(*p*) Lyon *v.* Knowles, 3 B. & S. 556.

[1] See *ante*, p. 20, note.

(*q*) Mair *v.* Glennie, 4 M. & S. 240; Wilkinson *v.* Frazier, 4 Esp. 182; and see Perrott *v.* Bryant, 2 Y. & C. Ex. 61. See, also, Stavers *v.* Curling, 3 Bing. N. C. 335, where the captain was to be paid a sum equal to 12 per cent. on the net

*26 tended; *and even when persons who shared profits were held to incur liabilities as if they were partners, it was held that persons who merely divided gross returns, did not incur any such liabilities. (r) *A fortiori* it was impossible to regard them as partners *inter se.* The act of 28 & 29 Vict. c. 86, which will be noticed hereafter, renders this even clearer than before.

5.—*Partnership is not the result of an agreement which is not concluded.*

Unconcluded agreements.

In order that partnership may result from any agreement, it is necessary that the parties to the agreement shall have mutually assented to the same propositions; otherwise there is no contract at all, but merely a treaty from which each party is at liberty to retire.[1] If, therefore, A proposes to B that a

proceeds, after deducting certain expenses. He brought an action for what was due to him, and recovered, but no question of partnership arose. Some of the customs established amongst whalers will be found in Fennings *v.* Grenville, 1 Taunt. 241, where it was held that one of two tenants in common of a whale could not maintain trover against his cotenant for half of the blubber, etc., yielded by the whale.

(r) *Post*, § 2, p. 37.

[1] Where a complaint for a dissolution of a partnership alleged that on a certain day the parties were partners doing a certain business and entitled to share the profits and losses in a certain ratio; but there was no allegation of any executed partnership agreement between them: *Held*, on demurrer, that the allegation that the parties were partners was an allegation of a conclusion of law, and that such complaint did not state facts sufficient to constitute a cause of action. As between the partners, the ultimate facts whence a partnership is deduced, are first, the agreement, and second, its execution. Summed up as the executed agreement, there can be no partnership between parties, so far as they solely are concerned, without a consent thereto and fulfillment thereof. Grooves *v.* Tollman, 8 Nev. 178.

M., a sutler in Virginia, said to E. as E. was about starting for Vermont: "If you will come back, I will take you and S. in, and give each of you one-fourth and take one-half myself, and I will furnish all the capital." E. replied that he would come back, but S. was not present and knew nothing about the matter. Upon arriving in Vermont, E. purchased the boots in question, of the plaintiff, upon his own credit, as he supposed, directing the plaintiff to send them to "F. Evans, Georgetown, D. C," and at the same time told the plaintiff that he was going into business with M. and S. The plaintiff charged the boots to F. Evans & Co. Soon after E. returned to Georgetown he took the boots, sold one case of them, and took the remainder to his sutler's tent, where E. and S. worked for eight weeks, nothing being agreed upon as to how they were at work there. At the expiration of this period, and when the boots, ex-

partnership shall be formed between them on certain terms, and B either does not accept the proposal or accepts it on other terms than those offered, A and B are not yet agreed, and no partnership subsists between them. Nor is B bound by his qualified acceptance; for that is merely a counter offer on his part, which he is at liberty to retract until A has assented to all its terms without qualification.

There are many decisions illustrating these principles, but as they all relate more particularly to agreements to take shares in companies, it will be more convenient to consider them when treating of that subject. (*s*)

Cases in which there is no contract, because there has never been a mutual assent to the same terms, must not be confounded with cases in which a valid contract has been entered into, but which, being conditional, and not having been performed on the one part, is not binding on the other. These will be considered hereafter.

*6.—*Partnership is not the result of an agreement to share profits so long as anything remains to be done before the right to share them accrues.* *27

It is important to distinguish between actual and contemplated partnerships. Persons who are only contemplating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners before the arrival of the time agreed upon. (*t*)[1] It is not always easy to determine whether an agreement

Contemplated partnerships.

cept six pairs, had been sold, and the money received for them put into his drawer, M. E. & S. formed a co-partnership from that date, with no reference back, M. furnishing the whole capital: *Held*, that they were not jointly liable for the boots purchased by E. If. when the co-partnership was formed, M. then became liable to pay for those on hand, or to account for the avails of those previously sold, his liability was to E. and not to the plaintiff. Davis *v.* Evans, 39 Vt. 182.

(*s*) See *infra*, Book I, Chap. v. § 1. In McClean *v.* Kennard, 9 Ch. 336, an agreement to become partners with executors, was held to create a partnership with those only who proved.

(*t*) *Per* Parke, J., in Dickinson *v.* Valpy, 10 B. & C. 141, 2.

[1] See Moody *v.* Rathburn, 7 Minn. 89; Chapman *v.* Watson, 1 Rob. (Va.) 267; Adams Bank *v.* Rice, 2 Allen, 480; Cook *v.* Carpenter, 34 Vt. 121, and the cases below cited.

An inchoate partnership must become complete before liability to creditors can attach. Irwin *v.* Bidwell, 72 Pa. St. 244.

In order to render partners liable as such to third parties, there must be not only an agreement to share the profits

amounts to a contract of partnership or only to an agreement for a future partnership. The test, however, is to ascertain from the terms of the agreement itself whether any time has to elapse or any act remains to be done before the right to share profits accrues; for if there is, the parties will not be partners until such time has elapsed or act has been performed.

and losses, but an entering upon some business thereunder. Lucas *v.* Cole, 57 Mo. 143.

A mere promise to "go halves" in a purchase of land, if not carried into effect, does not make the promisor a partner, so as to bind him to pay a note executed by the grantee in both of their names, for improvements thereon. Huckabee *v.* Nelson, 54 Ala. 12.

Evidence of an agreement between a surviving partner and a deceased partner, that, upon the death of the deceased partner, his brother should become a partner in the concern, and be entitled to a share of the profits, is not sufficient to establish a partnership. Brink *v.* New Amsterdam Fire Ins. Co. 5 Robt. 104.

A partnership may be contracted to take effect at a future time, or on certain conditions. Avery *v.* Lauve, 1 La. Ann. 457.

Unless the condition on which a partnership is formed is a condition precedent, its non-fulfillment does not annul the contract. Murray *v.* Johnson, 1 Head, 353.

A and B executed a contract on the 17th day of April, 1855, which they entitled "articles of co-partnership," by which they declared their intention to form a co-partnership for the purpose of trade, which should continue for three years from the first day of May, 1855. The contract declared the parties to be equal owners of a certain stock of goods, of which a schedule was annexed, and that they were to continue to be owners of the same in the same proportions, and contained various provisions with regard to the mode of conducting the partnership business: *Held*, that the term of the co-partnership was not to commence until the first day of May, 1855, and until then the contract was merely an executory one, which either party had the power to refuse to perform, such refusal constituting only an ordinary breach of contract, for which the party was liable in damages, and not a dissolution of and existing co-partnership. Reboul *v.* Chalker, 27 Conn. 114.

Where a proposed partnership, evidenced by a letter, contemplates in its terms but one transaction, at the conclusion of which the profits are to be divided, and the same letter which makes the offer to enter into the transaction on the joint account, sets a limit on the quantity of stock to be purchased for it, prescribes that it be bought on a joint credit, and requires that the stock when purchased shall be sent by particular persons to be sold in a particular market under the supervision of the party making the offer, and the party receiving the letter so acts as to fulfill no one of the requirements contained in it, there is no partnership, and in the event of loss, the party receiving the offer cannot maintain a bill for an accounting as partners and contribution. Metcalf *v.* Redman, 43 Ill. 264.

An agreement was entered into by which the plaintiff, for a fixed annual compensation, was to render service for the defendant in a factory of which he had recently become owner. If certain incumbrances on the property were paid as they became due, from the profits of the business, and if the plaintiff's

The general principle that so long as an agreement to form a partnership is executory, no partnership is formed, applies as well to ordinary partnerships as to projected companies, and it will be useful to consider it with reference to each in turn.

(a) *Application of the principle to ordinary partnerships.*

It is not unusual for a person who contemplates joining another in business to agree that such business shall be carried on upon certain terms not themselves creating a partnership, and to stipulate for an option to become a partner, either

Option to become a partner.

notes on demand were paid, then the defendant was to convey to the plaintiff one-half of the property and business, and not otherwise: *Held*, not a partnership, on the ground that the agreement was executory. Haskins *v.* Burr, 106 Mass. 48.

Where an existing partnership takes in a new partner, by a written instrument signed by the old members and the new, which written instrument recites the payment of a certain sum by the incoming partner, and conveys to him one-third interest in the assets, and consents that he shall have a third interest in the profits, the new partnership is complete on the execution of the instrument, notwithstanding it may be agreed that an account of the stock shall be taken, and if it exceeds a certain sum, the new partner shall pay one-half of that sum. Phillips *v.* Nash, 47 Ga. 218.

The existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced, there is a partnership until legally dissolved. Hartman *v.* Woehr, 18 N. J. Eq. 383.

A contract for constituting a partnership, assigning the performance of certain things to put the business to be carried on into operation, constitutes a partnership at the signing of the contract, not from the commencement of the business itself. Aspinwall *v.* Williams, 1 Ohio, 38; Austin *v.* Williams, 2 Id. 282; Crary *v.* Williams, 2 Id. 284.

An advance of money to a person engaged in business, and which was used by him for the purchase of goods, does not create a partnership, although it may be made in anticipation of a future partnership, which is never consummated. Hubbell *v.* Woolf, 15 Ind. 204.

Under an agreement that Y. should furnish a certain sum to be used by H. in buying and selling certain kinds of goods until a specified day, and that each should have one-half of the profits, and that Y. was then to be "received into full partnership" in the business on contributing a certain further sum: *Held*, 1. That this did not constitute them partners *inter sese* during the period first mentioned. 2. That it was H's duty, at the end of that period, to render a statement of the purchases and sales, with a view to a division of the profits. 3. That his refusal to do so excused Y. from entering into the partnership which was then to be formed. Haile *v.* York, 27 Wis. 209.

Articles of partnership purporting to be between the complainant on the one part and the defendant and a minor brother on the other, but which were executed only by the two: *Held*, not to have made the minor brother a partner.

at a specified time, or at any time the person having the option may choose. Such agreements, if *bonâ fide* and not mere colorable schemes for creating a partnership, and at the same time concealing it (*u*), do not create a partnership until the person having the option has exercised it, and elected to become a partner.

Ex parte Davis. *28

A strong illustration of this is afforded by *ex parte* Davis (*x*), * in which it was in substance agreed between Davis and Harris that Harris should carry on business in the name of "J. Harris & Co.," for the benefit of himself and any person Davis might, at any time within eight years name; that Davis should advance Harris 1200*l.* for the purpose of the business, and should become surety for him to a certain company; that Harris should give Davis promissory notes for his advances, and any sums he migh pay as surety; that Harris should carry on the business in partnership with Davis' nominee for twenty-one years on certain terms specified in the agreement; that the profits of the business should, for the first eight years, be applied, first, in paying Harris 100*l.* a year, secondly, in paying Davis his advances, with interest at 5*l.* per cent., and, thirdly, that the residue should be divided between Harris and Davis' nominee, in the proportions of one-third to the former and two-thirds to the latter, and that all losses should be borne in the same proportions. The agreement also contained clauses giving Davis a right to see the accounts relating to the business, and a number of other clauses of a special nature, all tending to show, as was indeed not disputed, that Davis might at any time within the eight years nominate himself as partner, and become entitled to two-thirds of the business and to two-thirds of the profits accruing therefrom anterior to the nomination. However, there never were any profits, and before eight years had expired, and before any nomination by Davis had been made, Harris became bankrupt; and the

McGunn *v.* Hamlin, 29 Mich. 476.

Where goods are purchased by several parties, under an agreement to hold them in aliquot shares, and with no arrangement for a joint sale, but with the intention of subsequently forming a co-partnership in regard to the goods, until the partnership agreement is actually made the purchasers, are not co-partners, but only tenants in common. Baldwin *v.* Burrows, 47 N. Y. 199.

(*u*) See Courtenay *v.* Wagstaff, 16 C. B. N. S. 110.

(*x*) 4 De G. J. & Sm. 523. The agreement was in the form of a bond, and was, as Lord Westbury remarked, "an ingenious piece of mechanism." Such an agreement, however, cannot be relied upon as affording protection against third parties.

question then arose whether Davis was entitled to prove against Harris' estate for the money Davis had advanced Harris. There were no persons claiming to be joint creditors of both Davis and Harris, and the question therefore was in substance whether, as between themselves, Davis and Harris were partners or not. The commissioner of the Bristol Court of Bankruptcy thought they were; but Lord Westbury properly reversed this decision, and held that whatever Davis' position might have been, as regards third parties, he and Harris had not become partners as between themselves.

Again, in Gabriel *v.* Evill (*y*), it was agreed between the* defendant and two others that the defendant should enter into partnership with them, and bring in 1000*l.* in cash and 1000*l.* in goods, and that the partnership should date retrospectively from the 1st of January; but the defendant reserved to himself the option of determining at any time within twelve months from that day whether he would become a partner or not. The defendant advanced the 2000*l.*, and several other acts were done in execution of the agreement; but within the twelve months the defendant declared his option not to become a partner, and it was held that he never did in fact become one, and that he had not incurred any liability as if he had. (*z*)

*29 Gabriel v. Evill.

In Price *v.* Groom (*a*), a debtor's business was carried on by him under an inspectorship deed, which authorized the trustees to carry on the business themselves; and to take the profits, if they chose. Their interest in the profits, however, did not commence until the debtor's interest determined; and it was held that whilst he carried on the business there was no partnership between him and them, they and he not being entitled to the profits at the same time.

Price v. Groom.

In Howell *v.* Brodie (*b*), the defendant, intending to become a partner in a scheme for making and letting out a market-place, advanced considerable sums of money, and

Share not yet taken.

(*y*) 9 M. & W. 297, and Car. & Marsh. 358. See, too, *Ex parte* Turquand, 2 M. D. & D. 339, which turned on the same agreement. See, also, *Re* Hall, 15 Ir. Ch. 287, a similar case.

(*z*) Compare this case with Jefferys *v.* Smith, 3 Russ. 158. There A agreed to purchase B's share in a firm; A acted and was treated as a partner by the other members, but afterwards rescinded the contract with B; it was held that a partnership nevertheless subsisted between A and B's co-partners.

(*a*) 2 Ex. 542.

(*b*) 6 Bing. N. C. 44.

ultimately, on the completion of the market, took one-seventh share in it. It was sought to make him liable for the expense of erecting the market, on the ground that he was a partner with those by whom the plaintiff had been employed; but the Court held that there was no partnership between them and the defendant until the share was taken by him.[1]

Partnership dependent on the result of experiments.

In Osborne *v.* Juillon (*c*) the plaintiff and the defendant agreed to work some patented inventions for their joint benefit. *But it was agreed that experiments should be made to satisfy the plaintiff as to the utility of the patent, and that if the plaintiff should be satisfied with the result of the experiments (such satisfaction to be testified by writing, signed by him), then the remaining clauses of the agreement should take effect, but not otherwise. The patents were worked for some time. There was nothing to show whether the plaintiff was satisfied or dissatisfied with the result, but it appeared that he was not sufficiently satisfied to insist on the agreement, and it was held that no partnership existed.

Share of profits expected in lieu of salary.[2]

In Burnell *v.* Hunt (*d*), an agreement was come to between A. and B, that A should take premises and purchase machinery and and materials to carry on the business of a

[1] On the formation of a partnership, for the purpose of speculating in Indian lands, certain rules and regulations were adopted at a meeting of the company, by which the number of shares was fixed, and his interest assigned to each partner; and by which it was required that a specified sum should be paid on each share; that relinquishments should be executed to the company of all interests in any of the lands embraced in their contract; that any service should be performed for the company in furtherance of its business when called upon by a resolution of the company; and that a failure to comply with any of these requisitions, or any violation of good faith to the interest of the company, should forfeit to it the interest of the person so offending: *Held*, that a person to whom an interest in the company was assigned at this meeting, and who assented within a reasonable time afterwards to take it, was liable as a partner, at least as to third persons, who afterwards dealt with the company, although he was not present at the meeting, did not pay the installment on the share assigned to him, did not execute the relinquishments, and did not perform any of the services required by the rules and regulations. Grady *v.* Robinson, 28 Ala. 289.

(*c*) 3 Drew. 596. The agreement in this case was long and unusual in its provisions, and even if the later clauses had come into operation, it would probably have been held that a *partnership* did not exist.

(*d*) 5 Jur. 650, Q. B. The real point here was whether B had any interest in the *goods*, which he clearly had not, and would not have had even if there had been profits to divide.

[2] See *ante*, p. 20, note.

silk lace-maker, and that B should manage the business and receive half the profits as soon as any accrued, and should, in the meantime, be paid 2*l.* a week. It was held that so long as the 2*l.* per week continued payable, there was no partnership. (*e*)

On the other hand, where two persons agreed to become partners from a subsequent day, upon certain terms to be embodied in a deed to be executed on that day, it was held that the partnership began on the day mentioned, although the deed was not executed until afterwards, and although alterations were made in it immediately before its execution. (*f*) In this case, however, the parties did in fact commence business as partners on the day named, and it was wholly immaterial (as regarded the question before the Court) what the terms of the partnership were.

Partnership articles to be drawn up.

*(*b*) *Application of the principle to joint-stock companies.* *31

Promoters of companies are not partners; they are, it is true, engaged in a common object, and that object is ultimately to share profits; but their immediate object is the formation of a company, and they are only in the position of persons who intend to become partners after the company is formed.[1] It was indeed said, in Holmes *v.* Higgins (*g*), that the projectors of a railway were partners, they being associated for the purpose of procuring the act of Parliament necessary to form the company, and subscribing money for that purpose; and, in Lucas *v.* Beach (*h*), the Court held that persons associated for the purpose of passing a turnpike act, and who had subscribed for shares in the proposed road, were partners. But in each of these cases the real question was, whether the plaintiff was entitled to recover from the defendants by virtue of any *implied* contract, any remuneration for services rendered by him for the joint benefit of himself and them. It was held that he was not; and if the Court had likened the case to one of partnership, instead of saying that the plaintiff and the defendants were partners, there would be no room for criticism. As it is, however, the cases are apt to be considered, and are sometimes cited, as authori-

Promoters of companies not partners.

Observations on Holmes *v.* Higgins; and Lucas *v.* Beach, *contra.*

(*e*) See, too, *Ex parte* Hickin, 3 De G. & S. 662.

(*f*) Battley *v.* Lewis, 1 Man. & Gr. 155; and see Wilson *v.* Lewis, 2 Ib. 197.

[1] See *ante*, p. 4, note.

(*g*) 1 B. & C. 74.

(*h*) 1 Man. & Gr. 417. Barnett *v.* Lambert, 15 M. & W. 489, was a similar case.

ties for the proposition that persons engaged in passing through Parliament, bills to authorize the establishment of a company, are partners. In Lucas *v.* Beach it was asked in argument, "What is there to prevent a number of individuals from entering into a partnership with the limited object, in the first instance, of procuring an act of Parliament, and with an ulterior object in view when the act has passed?" (*i*) The answer is, that to call persons so associated partners is to ignore the difference between a contract of partnership and an agreement to enter into such a contract, to confound an agreement with its result, and to hold persons to be partners although they have not yet acquired any right to share profits.

It cannot be contended that the right to share profits would,
*32 *under such an agreement as is supposed, accrue before the passing of the act, and if not, how can the parties to such an agreement be *partners* at an earlier period?

For these reasons it is conceived that Holmes *v.* Higgins and Lucas *v.* Beach, cannot be relied upon as authorities on the question of partnership or no partnership. (*k*) Nor are they on this point reconcilable with later decisions. In Reynell *v.* Lewis (*l*), and Wyld *v.* Hopkins (*l*), in which the question was much discussed, it was held that no partnership subsisted between persons who had subscribed for the purposes of forming a railway company and of procuring the necessary act of Parliament; and this, which is the correct doctrine, was also distinctly stated by Lord Cranworth, in Capper's case (*m*), and has been recognized on many other occasions. (*n*)

Later authorities.

It is a necessary result of the principles established above that persons associated for the purpose of forming a joint-stock company are not partners. (*o*)[1] They clearly are

Subscribers to inchoate companies not partners.

(*i*) See, too, Lord Brougham in Hutton *v.* Upfill, 2 H. L. C. 691.

(*k*) They are authorities for the point actually decided, viz., that a person doing work for the joint benefit of himself and others, cannot recover compensation from them by virtue of any *implied* promise to pay him.

(*l*) 15 M. & W. 517.

(*m*) 1 Sim. N. S. 178.

(*n*) *e. g.* Batard *v.* Hawes, and Batard *v.* Douglas, 2 E. & B. 287; Walstab *v.* Spottiswoode, 15 M. & W. 501; Forrester *v.* Bell, 10 Ir. Law R. 555; Hutton *v.* Thompson, 3 H. L. C. 161; Bright *v.* Hutton, 3 H. L. C. 368; Hamilton *v.* Smith, 5 Jur. N. S. 32; Norris *v.* Cottle, 2 H. L. C. 647; Besley's case, 3 Mac. & G. 287; Tanner's case, 5 De G. & S. 182.

(*o*) Wood *v.* Argyll, 6 Man. & Gr. 928; Hamilton *v.* Smith, 5 Jur. N. S. 32; Hutton *v.* Thompson, 3 H. L. C. 161; Bright *v.* Hutton, Ib. 368.

[1] See *ante*, page 4, note.

not partners in the company to be formed; and for reasons already given they cannot be considered as members of a partnership formed to start the company.

It also follows from the same principles, that if persons enter into an agreement to take shares in a company formed for certain purposes and upon certain conditions, those persons are not bound to take shares in a company formed for different purposes or upon other conditions; and are not partners in such a company, unless they have accepted shares therein and precluded themselves from objecting to the variation of their agreement. A leading case on this subject is Fox *v.* *Clifton (*p*), which, with other cases of the same class, will be adverted to hereafter, when the formation of companies, and the question who are contributories when companies are being wound up, are discussed. (*q*) *33

Conditional contract.

SECTION II.—OF QUASI-PARTNERSHIPS.

Having now examined the nature of those agreements, which are, properly speaking, contracts of partnership, it is necessary to advert to the doctrines by virtue of which persons who are not partners at all, are nevertheless made subject to liabilities as if they were partners. In other words, it is necessary to explain what it is that creates a *quasi*-partnership, or, as it is usually called, a partnership as regards third persons.[1] This will involve an examination of the liability which a person incurs

Quasi-partnerships.

1. By sharing profits.
2. By holding himself out as a partner.

1. *By sharing profits.*

In the year 1775, De Grey, C. J., laid down the proposition in

(*p*) 6 Bing. 776.

(*q*) See *infra*, book i. Chap. 5, § 1; and book iv., under the head Contributories.

[1] To charge a defendant as a partner, one of two things is necessary: either he must have permitted his name to be used as one of the firm, thereby holding it out as a security to the community, or he must have participated in the profit or loss. Osborne *v.* Brennan, 2 Nott & M. 427.

Grace *v.* Smith (*r*), that "every man who has a share of the profits of a trade, ought also to bear his share of the loss." Eighteen years afterwards, viz., in 1793, this doctrine was discussed and approved in the celebrated case of Waugh *v.* Carver (*s*); and ever since that time until 1860 it was considered as clearly established, that by the law of England, all persons who shared the profits of a business incurred the liabilities of partners therein, although no partnership between themselves might have been contemplated.[a] Subtle distinctions were drawn between sharing net

(*r*) 2 Wm. Blacks. 998.

(*s*) 2 H. Blacks. 235.

[a] See Rowland *v.* Long, 45 Md. 439, where the evidence showed that there was to be a division of profits, but did not disclose in what proportion; Manhattan Brass, &c. Co. *v.* Sears, 45 N. Y. 797, where the business was to be carried on in the name of one party, and the agreement was expressed not to be for any purpose of business, or manufacture or partnership; Pratt *v.* Langdon, 12 Allen, 544, where L. bought a stock of goods with fixtures and furniture, hired the building, and agreed with W. that W. should conduct the business in his own name, pay all the bills and a certain portion of the purchase-money, keep the stock good by new purchases, and, if anything was left after such disbursements, the residue of the proceeds was to be equally divided between them, L. to have the right to take possession at any time, and it was *held* that L. was liable as a partner for debts contracted by W. in conducting the business; Everett *v.* Chapman, 6 Conn. 347, where a stipulated division of the manufactured articles was considered equivalent to a participation in the profit and loss.

Persons who jointly participate in the profits of trade or business, ostensibly carried on by another for his sole use and benefit, are equally liable, when discovered, with the ostensible and active owner to all creditors of the concern whose debts were contracted during the time of such participation, without knowledge of the same, or of the actual relations between the parties at the time the credit was given; and that liability exists notwithstanding the parties may have privately stipulated that they shall not be partners, and in contemplation of law really are not such as between themselves. Bigelow *v.* Elliott, 1 Cliff. 28.

An oral contract between S. (an army sutler), and D. was subsequently reduced to writing, which stated that "D. agreed to furnish the capital and procure a stock of goods necessary to commence and carry on the business of sutler as contemplated, *which he is hereby acknowledged to have done.*" S. was to give his personal attention and time to the business; and the profits, after re-paying D.'s advances, were to be divided between the parties: *Held*, that D. was merely to advance sufficient capital to procure the original stock, and purchases subsequent to the date of said written instrument were to be made from the proceeds of goods already sold; that S. having carried on the business in his own name and not as agent or employe of D. and being interested in the profits as such, was liable as a partner to persons of whom goods were subsequently purchased. Appleton *v.* Smith, 24 Wis. 331.

See, also, to the point that participation in profits constitutes partnership as to third parties: Sheridan *v.* Medara, 10 N. J. Eq. 469; Bromley *v.* Elliot, 38 N.

profits and gross returns; and between sharing net profits and payments varying with them; but it was taken for granted, both by judges and text writers, that where there was no statutory enactment to the *contrary, if net profits *34 were shared, it necessarily followed that liabilities were in-

H. 287; Cushman *v.* Bailey, 1 Hill, 526; Oakley *v.* Aspinwall, 2 Sandf. 7; Catskill Bank *v.* Gray, 14 Barb. 471; Motley *v.* Jones, 3 Ired. Eq. 144; Wood *v.* Vallette, 7 Ohio St. 172; Lengle *v.* Smith, 48 Mo. 276; Williams *v.* Gillies, 53 How. Pr. 429; Sager *v.* Tupper, 38 Mich. 258; Strader *v.* White, 2 Neb. 348; Taylor *v.* Terme, 3 H. & J. 505; Noyes *v.* Cushman, 25 Vt. 390; Craig *v.* Alverson, 6 J. J. Marsh, 609; Everett *v.* Coe, 5 Den. 180.

See, however, *post*, p. 34, note.

An agreement between one partner and a third person, that the latter shall participate in such partner's share of the profits of the firm, as profits, renders him liable as a partner to the creditors of the firm, although as regards the other members of the firm he is not their co-partner. Fitch *v.* Harrington, 13 Gray, 468.

An agreement was made between several that certain of their number should be named as co-partners in partnership articles, and that the other should have a certain proportion of the interest of certain of those so named, which agreement was carried into effect: *Held*, it appearing that it was the mutual desire of all that those not named in the articles should be interested as partners, and that it was their common opinion that the interest of the firm would be best subserved by those not to be named in the articles, not appearing to the world as partners; and it also appearing that the above mode was adopted to accomplish the desired result; that it was the intent of all the parties, including Snyder, that he should, as between themselves, have the interest of a partner; and that the form of the written contracts, drawn and executed, could not prevent the liability of a partner attaching to Snyder, as between him and third persons dealing with the firm while this relation existed. Burnett *v.* Snyder, 13 Jones & Sp. 577.

But, although participation in the profits of a firm is enough, in most cases, to render a man a partner, yet it gives him no title to the capital stock, if his interest be merely in the profits. Bartlett *v.* Jones, 2 Strobh. 471.

Where one who held a contract for the construction of a railway, assigned it to trustees to execute it and divide the profits among certain persons: *Held*, that the assignor, the trustees, and the persons receiving the profits, with notice of the trust, were personally liable as partners. It was not material that the *cestuis que trust* were described as the stockholders in a coporation, nor that the corporation guaranteed all persons from liability in the execution of the contract; nor that the corporation agreed to advance funds and receive a commission; nor that part of the work had been done by the corporation in the expectation that the contract would be transferred to it, and the contractor agreed with the railway company to pay the corporation for the work that had been done. These circumstances could not make the contract the property of the corporation, nor render the profits corporate property. Credit Mobilier *v.* Commonwealth, 67 Pa. St. 233.

A contract for one to furnish factory and materials, and another to manufacture, and either to sell the product, and the proceeds to be divided, con-

curred. Moreover, there were many persons of ability who maintained that this rule was based upon principles which were satisfactory and morally just. Other persons, however, took a different

stitutes a partnership. The owner of the factory may be held liable for money advanced to the manufacturer on a contract to deliver the manufactured product, which he has failed to perform. Farmers' Ins. Co. *v.* Ross, 29 Ohio St. 429.

Where C furnished money to D, to be employed in trade, either by D alone, or in partnership with a third person, the net profits to be equally divided between C and D, and D entered into partnership with B: *Held*, that, as between C and D, this was only a loan, but, as to creditors dealing with D, they would have been considered partners; but that B, who, before he entered into partnership, knew the nature of the transaction between C and D, was not entitled to claim against C, as a partner of D. Bailey *v.* Clark, 6 Pick. 372.

The defendant, Roat, advanced $700 to defendant Maar, a traveling showman, upon the agreement that, after payment of all expenses, Roat was to receive back the $700 and one-half of the net profits: *Held*, that the defendants were partners as to third persons, irrespective of any agreement to the contrary between themselves. Haas *v.* Roat, 16 Hun, 526.

A contract by which the owners of certain vessels unite in an association to carry passengers and freight for hire, each furnishing a certain capital to the association, and each receiving a certain proportion of the profits, constitutes the owners, as to third persons, commercial partners, and, as such, liable *in solido* for the debts of the association, no matter what restrictive clauses the contract may contain. Cooley *v.* Broad, 29 La. Ann. 345.

The owner of a tug agreed with the owner of a barge that both vessels should be employed in a freighting business, the wages of the servants of the association, and expenses, except for repairs, to be paid out of the earnings, and the balance or profits to be divided between them in proportion to the stipulated values of the vessels: *Held*, that this agreement constituted a partnership, and that either partner was liable in an action of tort for damages caused by the negligence of the servants and agents of the partnership while conducting its business. Bowas *v.* Pioneer Tow Line, 2 Sawyer, 21.

Upon an agreement between A and B, that A should take certain negroes of B, and work them in a blacksmith's shop, furnish all supplies, pay all expenses, and give B one-half of the net proceeds of the shop for the use of the negroes: *Held*, that as to third persons, A and B were partners. Buckner *v.* Lee, 8 Ga. 285.

A lease of a steam-mill and appurtenances reserved as rent one-half of the net profits of the business, and also provided that the lease should not be assignable, and should cease on the death of the lessee, or in case he should be unable from any cause to give his personal attention thereto: *Held*, that the lease constituted a partnership as to third parties. Dalton City Co. *v.* Hawes, 37 Ga. 115.

L. agreed to lease to W. and T. for eleven months, a steam saw-mill, in which the latter were to make certain improvements and repairs, and to run the mill with due diligence, and L. was to advance $1,000 for making such improvements and repairs, and to bear one-third of the expenses of the same above that sum. The lumber when manufactured was to be shipped to Chicago, to some one whom L. should designate, to be

view of the propriety of the rule (*t*), and were unable to understand why a person lending money at a fixed rate of interest should be treated as a creditor, and be exposed to no risk beyond the loss of

sold, and the proceeds, after paying freight, to be applied as follows: seventy-five cents per M. feet to be paid to L, on account of rent of the mill; $1.75 per M. to be paid to W. and T. as expenses of manufacturing the lumber; from the residue L. was to be paid any advances made by him for logs to stock the mill, with interest. After all expenses for logs and for manufacturing, selling and shipping the lumber, were paid, W. and T. were to pay L. one-fourth of the net proceeds of the business: *Held*, that under this contract L. W. and T. were partners, and jointly liable as such for repairs to the mill. Whitney *v.* Ludington, 17 Wis. 140. See, also, Upham *v.* Hewitt, 42 Wis. 85.

A being the lessee of a farm, B furnished laborers thereon under him, with the agreement between them to share the net profits equally: *Held*, that this was a partnership, and that B was liable for debts contracted for A on account of the concern. Brown *v.* Higginbotham, 5 Leigh, 583.

An agreement between the owner of a vessel and the captain, that each should pay certain expenses, and divide the freight, with a power to the captain to invest it on joint account, constitutes a co-partnership. Cox *v.* Delano, 8 Dev. L. 89.

An association of separate owners of several steamboats into a joint concern, to run their vessels upon the Hudson river, and to collect and receive the earnings of the boats in a common fund, out of which the expenses of all the boats are to be paid, is no more than a private co-partnership in a particular business or transaction. The Swallow, Olcott Adm. 334.

Where A, B and C ran a line of stage coaches from Utica to Rochester, and the route was divided between them into sections, the occupant of each section furnishing his own carriages and horses, hiring drivers, and paying the expenses of his own section; and the money received as the fare of passengers, deducting therefrom only the tolls paid at turnpike gates, was divided among the parties in proportion to the number of miles of the route run by each; and an injury happened to a third person through the negligence of the driver of the coach of A: *Held*, that a joint action on the case at the suit of the party injured, lay against B and C as well as A. Bostwick *v.* Bissell, 11 Wend. 571.

Where A agrees with B that B shall buy such lands as they please, in B's name and on his responsibility, and that A shall not be responsible for any liabilities or acts of B, except that so far as cash capital shall be placed in the hands of B, that capital shall be subject to its proportion of the losses, A is liable for services rendered by another as clerk and bookkeeper in conducting the joint business of the associates. Benners *v.* Harrison, 19 Barb. 53.

Where a father and a son, both living on the place, farm together under an agreement that the father is to furnish the land, and the stock and provisions for the stock, and the son to furnish the hands and to superintend the work, and

(*t*) See the report on the Law of Partnership, printed by order of the House of Commons, in 1851, and particularly the evidence of the late Commissioner Fane. In the first edition of this work a long extract from his evidence was given, but it has not been thought necessary to re-print it here.

his advance; whilst a person lending money at a rate of interest fluctuating with, and payable out of, the profits of the borrower should be treated as a partner, and be exposed, not only to the loss

the crop to be equally divided between them, and nothing more appears, they are, as to third persons, partners in the enterprise. Adams *v.* Carter, 53 Ga. 160; S. P. Pettee *v.* Appleton, 114 Mass. 114.

On the other hand, where a non-resident commercial firm make an agreement with two resident firms, by virtue of which agreement one of the resident firms is to purchase certain merchandise, and ship it in the name of the other, and the other resident firm, with the money of the non-resident firm, is to pay for the merchandise, and each of the resident firms agree to receive, instead of fixed sums in payment of their services, certain proportions of the profits to arise from the subsequent sales of the merchandise, and also agreed to share in any losses resulting from said sales: *Held*, that such an agreement will not make the said firms commercial partners even as to third persons, when it appears that they did not intend to form a partnership, and that they have not held themselves out to the world as partners. Chaffraix *v.* Laffitte, 30 La. An. 631.

Two mercantile firms mutually agreed each to put out contracts for sale and delivery of produce at future days, all profits of such adventures, and all losses, to be equally divided between the firms: *Held*, that the members of one firm were liable with the other, as partners, upon a contract which the other firm made and signed in their own name, pursuant to this agreement. Smith *v.* Wright, 4 Abb. App. Dec. 274.

See, *ante*, p. 18, note.

Under articles of agreement signed by a married woman, her husband, and several other persons, reciting that she and one of the others have taken a lease of certain manufacturing works, and providing that she shall furnish a certain amount of capital at eight per cent., and that her husband shall devote his whole time to the business of manufacturing and selling the articles, and making special provisions as to the duties and rights of the others; and further providing that "she or her husband, as they two may decide or agree, shall receive one-half of the net profits of the concern," her husband is a partner in the firm; and she, therefore, is not a partner, and is not liable upon a promissory note given in the name of the firm. Plumer *v.* Lord, 7 Allen, 481.

A, B and C entered into articles of agreement with each other, to fit out an adventure to Texas, for the mutual benefit of all. A and B were to furnish all the capital and make the purchases here in their own names. B and C were to go out to Texas with the goods. C was to travel about the country there, dispose of the goods and procure remittances. B was to receive a certain sum per month for his services. C was to receive one-fifth part of the net profits of the adventure, and the remaining four-fifths were to be divided equally between A and B: *Held*, that A and B were liable as partners with C, especially as between them and third persons, who found them carrying on such joint adventure for their mutual benefit. Bucknam *v.* Barnum, 15 Conn. 67.

A. and H. entered into an agreement, whereby A. leased to H. a certain lot of land, on which the former was to make improvements at once, and the latter might add others from the profits of the concern, if both parties agreed thereto. H. was to manage the concern and give A. half the net profits, and to render A. liable for no sum over $100, without his

of his money, but also to the loss of whatever else he might have in the world.[1] In the first edition of this work the writer expressed a hope that the rule in question would ere long cease to exist; and he ventured to characterize it as arbitrary, unjust, and as productive of the greatest confusion. Since those words were written the whole subject has been thoroughly discussed, both in the highest court of appeal (*u*), and in Parliament; and the result has been that the rule, so far as it affords a conclusive test of liability (*v*), has ceased to exist;[2] for the House of Lords, and subsequently other

consent. H. purchased materials to fit up the buildings: *Held*, that A was liable therefor as partner. Brownlee *v.* Allen, 21 Mo. 123; Morgan *v.* Allen, Id. 127.

A and B entered into an agreement, by which A was to manufacture bagging at so much a yard, and B was to sell the bagging, and after paying to A the price agreed for manufacturing, and to B the cost of the raw material, and of transportation, the net profits were to be divided between them: *Held*, that B was not liable for the hire of a slave by A to assist in the manufacture of the bagging, and that A was alone liable therefor, the contract of hiring having been made by A as an individual, and not on behalf of the firm. Lafon *v.* Chinn, 6 B. Mon. 305.

[1] See *ante*, p. 23, note.

(*u*) Cox *v.* Hickman, 8 H. L. C. 268.

(*v*) That participation in profits is still a *primâ facie* test of partnership has been seen already, *ante*, p. 19, *et seq.*

[2] A right to a share of the profits, as such, is essential to constitute a person a partner. Heimstreet *v.* Howland, 5 Den. 68.

But one who is interested in the profits of a busines as profits, and not as a means of compensation for services, is a partner as to third persons, and is liable as such for the debts. Leggett *v.* Hyde, 58 N. Y. 272.

The rule that actual participation in the profits, as principals in general, creates a partnership as between the participant and third persons, whatever may have been the real relation of the former to the firm, has no application to a case of mere service or special agency, where the employe has no power in the firm, and no such interest in the profits as will enable him to go into a court of equity to enforce a lien for the same or to compel an account. Unless an employe is in some way interested in the profits of the business, as principal, he cannot be regarded as falling within the general rule, because, when not so interested, his condition is not different from that of an ordinary creditor: Berthold *v.* Goldsmith, 24 How. 536; Parker *v.* Fergus, 43 Ill. 437; Hallet *v.* Desbau, 14 La. Ann. 535; Conklin *v.* Barton, 43 Barb. 435; Chapline *v.* Conant, 3 W. Va. 507; Bendel *v.* Hettrick, 45 How. Pr. 198; Lewis *v.* Greider, 51 N. Y. 231. See *ante*, p. 20, note.

See, however, Taylor *v.* Terme, 3 H. & J. 505; Strader *v.* White, 2 Neb. 348.

An agreement, by which a person is to have a share of the profits of a business, is, however, competent evidence on the question of his liability as a partner in that business; but sharing profits in any other sense than sharing them as a principal, is not an absolute legal test of his liability. The ground of liability should be either that defendant is a principal, bound by a contract made by himself, or his agent acting by his authority, or that he is estopped to deny that

courts, have repudiated it, and Parliament has excluded its application from many cases in which it has been found by experience to produce inconvenience and injustice. Some notice, however, of the old law is necessary in order to understand the modifications thus introduced.

he is a principal under the general doctrine of estoppel. Eastman *v.* Clark, 53 N. H. 276.

C. and D. agree in writing that D. should furnish a stock of goods and shop fixtures, valued at $4000; that C. should pay rent for the shop, manage the shop and pay D. interest on half the $4000; and that they should divide the profits equally: *Held*, that they were partners as to third persons, notwithstanding an oral agreement between themselves that C. should receive the moiety of the profits instead of a salary. Brigham *v.* Clark, 100 Mass. 430.

An employé whose compensation depends on the profits of the business, and who, if nothing be made, is to receive nothing, and who on several occasions has held himself out as a partner, will be responsible as such to third persons, though *inter se* the parties never intended a partnership. Lee *v.* Bullard, 3 La. Ann. 462.

A person who receives profits in consideration of furnishing capital is clearly a partner, and is a partner as to third persons, even though it should be stipulated that the capital so furnished should be regarded as a loan, and the party furnishing it a mere creditor. Parker *v.* Canfield, 37 Conn. 250. See *ante*, p. 23, note.

In a suit to charge defendant as a partner with K. for debts incurred by K. evidence that the defendant had procured for K. a loan of money to be used in a purchase of cotton, and that K. had voluntarily promised to give the defendant a part of the profits, if any were made, for his assistance in procuring the loan, when no sum or proportion of profits was named, is wholly insufficient to establish partnership. Pleasants *v.* Fant, 22 Wall. 116.

Where a firm entered into a written agreement with another, to advance him a certain sum to enable him to carry on business, for which he was to pay interest on the average balance, and after deducting office expenses, the profits were to be equally divided between such party and the firm making the advances, but the firm was not to be responsible for losses: *Held*, that such agreement did not constitute a partnership. Smith *v.* Knight, 71 Ill. 148.

A railroad corporation, who lease to an individual a house owned by them, he paying them a certain sum annually, and "half the net proceeds arising from keeping said house as a hotel," and keeping an account open to their inspection, and giving his own time and attention, and having free passage over their railroad for himself and all persons employed and all articles used by him in carrying on the house, do not thereby become partners, even as to third persons, in the business of keeping the house. Holmes *v.* Old Colony Railroad, 5 Gray, 58.

If three enter into an agreement, by the terms of which one is to do certain things and the other two certain other things, each at their own expense, and each to be entitled to an equal share of the profits arising out of the subject-matter of the contract, this does not constitute them all partners, and make them all liable for expenses incurred by either in the performance of their part of the contract. Heckert *v.* Fegely, 6 Watts & S. 139.

1. *State of the law anterior to Cox* v. *Hickman.*

As already stated, the rule that persons who share profits incur liabilities as if they were partners, was laid down for the first time in Grace *v.* Smith. (*x*) The question there was whether the defendant was liable to a creditor of a firm; and the material facts were that the defendant (who had *been a partner, but who had notoriously retired before the creditor's demand arose) had advanced to the firm 4000*l.* upon the terms of being re-paid the principal and of re-

Origin of the rule that those who share profits are liable to losses.

*35

The mere fact that one is to receive a certain portion of the net profits of a firm, in consideration of his acceptance of certain drafts, will not make him liable as partner, if there was no holding out as such, and his name has not been used as partner. Polk *v.* Buchanan, 5 Sneed, 721.

A landlord who rents property and furnishes materials at a stipulated price to a firm, with which they carry on their business, does not become thereby a member of the firm, or responsible for their debts. Jones *v.* O'Farrel, 1 Nev. 354.

By a written contract between B. and R. B. agrees to furnish R. for one year with wool, to be worked into satinets. and R is to deliver to B. all the satinets which the wool will make, and is to find and pay for warps for the same. For working the wool, finding warps, etc., B. is to pay R. 40 per cent. on the sales of the satinets. Each is to pay half the charges. B is to have the whole direction of the sales, and, should he make sales himself, he is to have one and a half per cent. on 40 per cent. of the sales. In an action against B. and R. for the price of the warps furnished by the plaintiff to R., *held*, that B. was not a partner of R. and consequently was not liable to the action. Turner *v.* Bissell, 14 Pick. 192.

An agreement between two houses to share commissions on sales of goods forwarded by one to the other, does not constitute a partnership. Pomeroy *v.* Sigerson, 22 Mo. 177.

A shipmaster, having agreed to take the defendant's schooner for the purpose of getting employ in the freighting business, engaged to victual and man her, and pay half the port charges, pilotage, &c.; and the defendant engaged to pay the other half, together with $8 per month for one man's wages, and to put the schooner in sufficient order for the business; and all money so stocked in the schooner, whether for freight or passage, or whatever, was to be equally divided between the master and the defendant, each party accounting for the above: *Held*, that the master was owner *pro hac vice;* and that the contract did not make him and the defendant partners. Cutler *v.* Winsor, 6 Pick. 335.

Where one owning lands makes an arrangement with another to cut and run the cedar posts on the lands at his own expense on shares, the latter receiving half the posts and paying all the cutting expenses, these expenses cannot be regarded as partnership expenses, nor is the business such as to authorize any necessary inference of partnership. Denis *v.* Saunders, 36 Mich. 369.

An administrator advanced money to enable the persons receiving it to cut and remove from the estate certain logs, under an agreement that the party should, after selling them, pay the money advanced and pay the stumpage, and then divide with the estate the bal-

(*x*) 2 Wm. Blacks, 998.

ceiving, so long as it remained unpaid, interest at 5*l.* per cent. and an annuity of 300*l.* a-year. The verdict was for the defendant, and the Court refused a new trial. De Grey, C. J., gave his judgment as follows:—

Judgment in Grace *v.* Smith.

"The only question is, what constitutes a secret partner. Every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for re-payment. And there is no difference whether that money be lent *de novo*, or left behind in trade by one of the partners who retires; and whether the terms of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is to inquire whether Smith (the defendant) agreed to share the profits of the trade with Robinson (the continuing partner), or whether he only relied on those profits as a fund of payment, a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits, and I think there is no foundation for granting a new trial."

This judgment and not the *decision* in the case, has always been regarded as the

ance of the money realized: *Held*, that this transaction did not amount to a partnership. Ford *v.* Smith, 27 Wis. 261.

B., owner of a public ferry, leases it to F. for two years in consideration of $1,000 paid to him by F. in cash; and it is agreed between the parties that if the net profits of the ferry do not yield F. $2,000 within the two years, F. shall hold over the term until the profits yield the $2,000, and if the profits give more than $2,000 within the two years, the surplus shall be equally divided between them: *Held*, this contract does not constitute a partnership between B. and F., in the ferry, and B. is not liable for losses by negligence at the ferry, during the term of F.'s tenancy thereof. Bowyer *v.* Anderson, 2 Leigh, 550.

D. bought cattle through N., who was his agent, in the name of N., the agreement being that N. should butcher and sell the meat, and out of the proceeds return to D. the cost and one-fourth of a cent per pound of dressed meat additional, and that N. should have the balance: *Held*, that this did not constitute a partnership. Dale *v.* Pierce, 85 Pa. St. 474.

A testator provided in his will that A B should have, hold and carry on, in a husband-like manner, free of rent, a certain house, store and other real estate, until the time when the eldest son of the testator should be of age; and directed that he should be trustee of the testator's two sons, for the following purposes, to wit: That he should retain in his hands, for their use, all the goods, securities, money and other stock in trade belonging to said store during said term; should trade upon the same, in his own name, as such trustee, and at the end of the time deliver over to said sons all the original stock then remaining, and one full half of all the profits, and also interest upon a certain portion of such stock. A B accepted the trust, and carried on the business; and on the arrival of the eldest son at the age of twenty-one, he executed to said A B a power of attorney, authorizing him to continue the business of the store, etc., as he had done under the will, and it was thereupon continued until the youngest son became twenty-one: *Held*, that this did not constitute a partnership. Gibson *v.* Stevens, 7 N. H. 352.

great authority for the proposition, that a person who shares profits is liable to third parties as if he were in fact a partner. The judgment itself appears to have been based upon a prior case of Bloxham *v.* Pell (*y*), before Lord Mansfield, and in substance undistinguishable from Grace *v.* Smith. In Bloxham *v.* Pell, an outgoing partner became entitled to be paid by the continuing partner a certain sum of money with interest at 5 per cent., and also an annuity of 200*l.* a-year for six years, in lieu of the profits of the trade. The plaintiff sued him for a debt contracted after the dissolution, and Lord Mansfield held the defendant liable, on the ground that the agreement was a device to make more than legal interest of money, and if it was not a partnership it was a crime. And it should not lie in the defendant Pell's mouth to say it was usury and not a partnership. Lord Mansfield did not say a word in favour of the doctrine laid down in Grace *v.* Smith; but seeing a contract which on the ground of usury was invalid as a contract of loan, he nevertheless upheld it as a contract of partnership, which it plainly was not, but which was the only alternative if the agreement was to be upheld at all. (*z*)

Bloxham *v.* Pell.

Such was the origin of the rule in question, which was approved and applied in the well-known case of Waugh *v.* Carver, the leading old authority on this subject. In Waugh *v.* Carver (*a*), two ship-agents, carrying on business at different ports, agreed to allow each other certain portions of each other's commissions and profits, but it was expressly agreed that neither of them should be prejudiced or affected by the losses of the other, or * be answerable for the acts of the other, but that each should be answerable and accountable for his own losses and acts. It was admitted by the Court that this agreement created no partnership as between the parties to it; but it was nevertheless held, on the principle enunciated in Grace *v.* Smith, that both parties to the agreement were answerable for the business debts of each, and a creditor who sued both for goods supplied to one, obtained judgment against both accordingly.

Waugh *v.* Carver.

*36

Other cases, in which the same principle was applied, need only be shortly referred to. It was held that a *quasi*-partnership subsisted between merchants who divided the commissions received by each other on the sale of goods recommended or "influenced" by the one to the other (*b*); so between persons who agreed to share the profits of a single isolated adventure (*c*); and between persons, one of whom was in the position of a servant to the others, but was paid a share of the profits instead of a salary (*d*); and between persons, one of whom was paid an annuity out of the profits made by the others (*e*); or an annuity in lieu of any share in those profits (*f*). So between the vendor and

Application of the foregoing doctrines.

(*y*) Cited in 2 Wm. Blacks. 999.

(*z*) See Jestons *v.* Brooke, Cowp. 793, and *ante*, pp. 22, 23.

(*a*) 2 H. Blacks. 235, and 1 Smith's Lead. Ca. 838, edit. 6.

(*b*) Cheap *v.* Cramond, 4 B. & A. 663.

(*c*) Heyhoe *v.* Burge, 9 C. B. 431; *Ex parte* Gellar, 1 Rose, 297; Hesketh *v.* Blanchard, 4 East, 144.

(*d*) *Ex parte* Digby, 1 Deac. 341; *Ex parte* Rowlandson, 1 Rose, 92; and see Withington *v.* Herring, 3 Moo. & P. 30.

(*e*) *Re* Colbeck, Buck. 48; *Ex parte* Hamper, 17 Ves. 412; *Ex parte* Chuck, 8 Bing. 469.

(*f*) Bloxham *v.* Pell, 2 Wm. Blacks. 999, *ante*, p. 35.

purchaser of a business, if the former guaranteed a clear profit of so much a year, and was to have all profits beyond the amount guaranteed. (*g*)

Moreover, the character in which a portion of the profits was received did not affect the result. For a person who as executor or trustee merely employed money in trade or business, and shared the profits arising from it, incurred all the liabilities of a partner, although he in fact had personally no interest whatever in the matter. (*h*) On the other hand, the *cestuis que trustent* were also liable; the creditors having an option against which of the two they would proceed. (*i*)

Again, persons who shared profits were *quasi*-partners, although their community of interest was confined to the profits. In Smith *v.* Watson (*k*), a broker, who was paid by a share of the profits arising from the sales made by him, and who was therefore a *quasi*-partner with the person employing him, was nevertheless held to have no interest in the goods sold.

Distinction between sharing profits and gross returns.

But notwithstanding the extent to which the doctrine *37 laid down in Grace * *v.* Smith, was carried, it was long ago established that persons who shared only gross returns were not *quasi*-partners,[1] and subtle distinctions were taken between a payment out of profits and a payment varying with them, and between an agreement to share profits as such and an agreement to share profits not as profits, but as something else. These subtleties were attributable on the one hand to the establishment of the rule that persons who shared profits should be answerable for losses, and on the other, to a disinclination to apply that principle to cases in which it was clear that those who shared the profits never intended to become partners *inter se*.

Benjamin *v.* Porteus.

First, as to gross returns. In Benjamin *v.* Porteus, (*l*) an agreement was made between the plaintiff and a broker, by which the broker, instead of a commission on the sales effected by him for the plaintiff, was to have the whole proceeds of the sales, less 2*s.* 6*d.* per lb., which was to be paid to the plaintiff. This was held not to give the broker such an interest in the goods sold by him, as to render him an incompetent witness for the plaintiff, his principal, in an action for their price. This decision seems to have paved the way to others, which went far beyond it. In Dry *v.* Boswell (*m*), Lord Ellenborough held that no *quasi*-partnership subsisted between the owner of a barge and the man who worked it, and who received for his wages half the gross earnings; and in Mair *v.* Glennie (*n*), where the captain of a ship was to be paid one-fifth of the profit or loss on an intended voy-

Dry *v.* Boswell.

Mair *v.* Glennie.

(*g*) Barry *v.* Nesham, 3 C. B. 641. Compare Pott *v.* Eyton, ib. 32, *infra*, pp. 38, 50.

(*h*) Wightman *v.* Townroe, 1 M. & S. 412; *Ex parte* Garland, 10 Ves. 119; Labouchere *v.* Tupper, 11 Moore, P. C. 198.

(*i*) See Goddard *v.* Hodges, 1 Cr. & M. 33. In this case the court held that the *cestui que trust* was liable to creditors, and that *therefore* he could not sue the co-partners of his own trustee. But surely this was wrong. There was no partnership between the plaintiff and defendants, no contract between them.

(*k*) 2 B. & C. 401; and see Burnell *v.* Hunt, 5 Jur. 650, Q. B., and Cheap *v.* Cramond, 4 B. & A. 663.

[1] See *ante*, p. 17, note.

(*l*) 2 H. Blacks. 590. See, too, Dixon *v.* Cooper, 3 Wils. 40.

(*m*) 1 Camp. 330; and see Wish *v.* Small, in the note there.

(*n*) 4 M. & S. 240. The expression profit or loss, in this case, must have been held equivalent to gross returns.

age, it was held that he and the owners of the ship were not *quasi*-partners. It had previously been decided in Wilkinson *v.* Frazier (*o*), that the crew of a whaling ship who were to be paid by the owners a certain share of the oil brought home, were not partners with them. Wilkinson v. Frazier.

The distinction between gross returns and profits (or, as they are sometimes called, gross profits and net profits), was acted upon by Mr. Baron Parke, in Heyhoe *v.* Burge (*p*), when he told the jury "a person who shares gross profits is not a partner; but a person who shares net profits is *primâ facie* to be considered as a partner." (*p*) Heyhoe v. Burge.

Next, as to the distinction between payments out of profits as such, and payments not out of them as such. The great enforcer of the distinction in question was Lord Eldon, who seems to have been led to make it by the impossibility of otherwise reconciling Grace *v.* Smith and Bloxham *v.* Pell. In *Ex parte* Hamper (*q*), his lordship is reported to have said: Distinction between sharing profits, and payments varying with them.

"It is clearly settled, though I regret it, that if a man stipulates that as the reward of his labor he shall not have a specific interest in the business, but a given sum of money even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is as to third persons a partner, and in a question with third persons no stipulation can protect him from loss." Ex parte Hamper.

*Other cases decided by his lordship contain dicta to the same effect, (*r*) and the distinction must be considered as settled in point of low. The latest case upon this subject is Pott *v.* Eyton. (*s*) The defendant Eyton was concerned in a colliery, and the defendant Jones kept a shop for supplying the workmen at the colliery. Eyton built the shop; licenses to sell tea, &c., were taken in his name, and he paid for the goods supplied to the shop. Jones managed the shop business. Eyton received first seven and afterwards five per cent. on the amount of all sales to the workmen, and Jones had all the rest of the profits of the shop, from whatever source derived. The question was whether Eyton and Jones were partners or *quasi*-partners. The jury found that there was no agreement to share profit and loss, and the Court of Common Pleas acted on the distinction taken in *Ex parte* Hamper, and on the distinction between profits and gross returns, and held that no partnership or *quasi*-partnership existed. *38 Pott v. Eyton.

A loan of money to be re-paid with interest, however exorbitant, did not constitute a *quasi*-partnership between the borrower and the lender (*t*), unless profits were expressly pointed at as the fund for payment. (*u*) Loans.

(*o*) 4 Esp. 182. See *ante*, p. 25, note. (*q*)

(*p*) Heyhoe: Burge, 9 C. B. 431; see Ib. 440, 444.

(*q*) 17 Ves. 412.

(*r*) See *Ex parte* Rowlandson, 1 Rose, 89; *Ex parte* Langdale, 18 Ves. 300; *Ex parte* Watson, 19 ib. 461.

(*s*) 3 C. B. 32. See further as to this case, *infra*, p. 50.

(*t*) Grace *v.* Smith, 2 Wm. Blacks. 998.

(*u*) Gilpin *v.* Enderby, 5 B. & A. 954; Fereday *v.* Hordern, Jac. 144; Bloxam *v.* Pell, *ante*, p. 35. See as to the two first cases, *ante*, p. 23.

2. *Modifications introduced by the House of Lords in Cox* v. *Hickman.*

Such was the state of the law when the case of Cox *v.* Hickman came before the House of Lords; and that tribunal, in effect, decided that persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally, or by others as their real or ostensible agents. (*x*) [1]

Cox v. Hickman.

The question in Cox *v.* Hickman (*y*) was substantially whether the scheduled creditors to a deed of arrangement, who were to be paid their debts out of the profits of their debtors' business, were liable to debts contracted by the *39 *trustees in carrying on that business pursuant to the deed; (*z*) and it was ultimately decided that they were not.

The Lords were unanimous in treating the matter before them as a mere question of agency, and in holding that the circumstance that the profits of the business were to be shared by the scheduled creditors was by no means sufficient to show that the trustees were their agents and authorized to act as such on their behalf. (*a*)

Observations on the decision of the House of Lords.

In Cox *v.* Hickman, the persons whose liability was in question were only entitled to share profits to the amount of their respective debts, and this circumstance was greatly relied upon as distinguishing the case from Waugh *v.* Carver, and others of that class, in which the profits were shared to an indefinite extent. But it is plainly not consistent with the reasoning in Cox *v.* Hickman to hold that the mere fact that profits are shared indefinitely, raises an irrebuttable presumption that those who share them are the principals of those who make them. The

(*x*) Cox *v.* Hickman, 8 H. L. C. 268.

[1] See *ante*, p. 34, note.

(*y*) Hickman *v.* Cox, 18 C. B. 617, and 3 C. B. N. S. 523; Cox *v.* Hickman, 8 H. L. C. 268. See, also, The Stanton Iron Co. 21 Beav. 164; Price *v.* Groom, 2 Ex. 542, and *ante*, p. 29. Owen *v.* Body, 5 A. & E. 28; and James *v.* Whitbread, 11 C. B. 406, may also be referred to on the subject of partnership created by creditors' deeds; and as to the non-liability of inspectors for debts not contracted by them as principals, see Redpath *v.* Wigg, L. R. 1 Ex. 335; Easterbrook *v.* Barker, L. R. 6 C. P. 1.

(*z*) The defendants actually sued were two trustees, who were also scheduled creditors; one of them never acted as trustee, and the other had retired from the trusteeship before the debts in question were contracted. But all the judges agreed that there was no difference between the liability of the defendants and that of the other scheduled creditors.

(*a*) Baron Bramwell had taken the same ground. See 3 C. B. N. S. 552.

circumstance that one person shares all the profits made by another, is no doubt an important element to be considered in determining the true relation in which those persons stand to each other; but it no more conclusively shows such relations to be one of agency, than it conclusively shows that the persons in question are truly partners *inter se*. In fact, although the House of Lords in deciding Cox *v.* Hickman, professed to overrule no previous authority, the effect of that decision has unquestionably been to put a great branch of partnership law on a substantially new footing. The following more recent decisions conclusively show this.

More recent decisions.

Kilshaw v. Jukes.

In Kilshaw *v.* Jukes (*b*) it was held that a person who advanced money and supplied goods to two others on the terms of being repaid the advances and price of the goods out of the profits of a building speculation, if such profits should be sufficient for the purpose, was not liable to debts contracted by them for the purposes of the speculation.

*In *The English and Irish Church and University Insurance Society* (*c*), it was held that the holders of policies of insurance who were entitled to be paid out of the funds of an insurance society, not only the sums originally insured, but also such bonuses as by the rules of the society might be added thereto out of the profits of the society, were not liable as partners with the members of the society either to the holders of other policies issued by it, or to its other creditors. *40

English, &c., Insurance Society.

In Bullen *v.* Sharp (*d*), the whole profits of a son's business were assigned over to his father and another person upon trust, first to pay the father 500*l.* a year, to be increased to a sum equal to one-fourth of the profits when one-fourth thereof amounted to more than 500*l.* a year; secondly, to pay an annuity to the son; thirdly, to form a reserve fund for the benefit of the son; and fourthly, to pay the residue of the profits to the son. The Court of Common Pleas held the father liable for the engagements of the son, upon the ground that the profits having been assigned to him, he had a direct interest in the business. On appeal, however, this decision was reversed, on the ground that the business was really the son's, and that the father's interest in it was not such as to render the son his agent for carrying it on.

Bullen v. Sharp.

(*b*) 3 Best & Sm. 847.
(*c*) 1 Hem. & M. 85.
(*d*) L. R. 1 C. P. 86, reversing 18 C. B. N. S. 614.

In Shaw *v.* Galt (*e*), it was held that a clerk, entitled to a fixed salary, and in addition thereto to one-third of the net profits of the business of his employers, was not liable to their creditors. The salary and share of profits were only intended as a remuneration for his services, and the profits were to be ascertained from balance-sheets prepared by the employers upon the principle theretofore adopted by them.

Shaw *v.* Galt.

In Holme *v.* Hammond (*f*), five persons agreed to become partners for seven years, and to share profits and losses equally, and they further agreed that if any partner died within the seven years, the survivors should continue the business and pay to the executors of the deceased partner the same share of profits which he would have had if living. One of the partners died; he had no capital in the firm, but on his *death the firm was indebted to him in respect of undrawn profits and other matters. After his death the business was carried on by the survivors; his executors took no part in the management of the business, but they claimed one-fifth of the profits made since his death, and they were furnished with accounts in which they were credited with such profits. The plaintiff sued the executors in respect of a contract made by the surviving partners after the death of the deceased partner, but it was held that the executors were not liable; for the surviving partners were not their agents, and although the case did not fall within the provisions of 28 and 29 Vict. c. 86, it was governed by the principles laid down in Cox *v.* Hickman.

Holme *v.* Hammond.

*41

Again, in Mollwo March & Co. *v.* Court of Wards (*g*), a person advanced large sums of money to merchants, and took as a security a charge on their business, with extensive powers of control, and stipulated for a large commission on their profits whilst anything remained due to him and for payment of his principal and twelve per cent. interest. The lender had not, in fact, taken any profits, and the above arrangement was afterwards varied by his taking a mortgage for his principal and interest. He was held not liable for debts contracted by them whilst the above agreement was in force. The court held that the transaction was really a loan. It was urged in vain that even if there was no partnership the debtors were the agents of the creditor to earn the

Mollwo March & Co. *v.* Court of Wards.

(*e*) 16 Ir. Com. Law Rep. 357.
(*f*) L. R. 7 Ex. 218.
(*g*) L. R. 4 P. C. 419. Compare Pooley *v.* Driver, 5 Ch. Div. 458, noticed *infra*, p. 45.

principal, interest, and commission to which he was entitled. But this contention very properly failed; there being no more reason for inferring agency than partnership from an agreement to share profits.

There can be no doubt that in all these cases the decisions would have been the other way had they occurred before Cox v. Hickman; and they are particularly valuable as showing that the principals on which that case was decided by the House of Lords may now be safely relied upon, in opposition to the old rule which, before that important decision, was considered too firmly settled to be questioned. In fact, the strong tendency of the above decisions is to establish the doctrine that no *person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se;* and it is perhaps not going too far to say that this is now the law. (*h*) At the same time, persons may find that they are partners for all purposes, although they only intended to be so for purposes beneficial to themselves. (*i*)

Observations on these cases.

*42

For the guidance, however, of those who may think that the writer has gone too far in representing the old law as completely superseded, the following more limited propositions are submitted as at least conclusively established, and as applicable even in cases not within 28 & 29 Vict. c. 86.

1. That persons who share the profit of a business are, like other persons, only liable for the acts of themselves and of their real or ostensible agents.

2. That whether in any particular case the relation of principal and agent does or does not exist between one person who carries on a business and another person who shares its profits, depends not upon the mere fact that the business is carried on, more or less, for the benefit of the latter, but upon all the circumstances of the case.

3. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to share the gross returns of a business or adventure conducted by another.

(*h*) See Baron Bramwell's judgment in Bullen *v.* Sharp, L. R. 1 C. P. 86; Holme *v.* Hammond, L. R. 7 Ex. 218; Mollwo March & Co. *v.* Court of Wards, L. R. 4 P. C. 419. See, also, *Ex parte* Tennant, 25 W. R. 854; S. C. 6 Ch D. 303.

(*i*) See Pooley *v.* Driver, 5 Ch. D. 458, noticed *infra*, p. 45.

4. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to be paid definite sums out of the profits made by another.

5. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to be paid sums varying with the profits made by another.

6. That the relation of principal and agent is not constituted merely by the existence of a trust entitling one person to profits made by another.

7. That *primâ facie* the relation of principal and agent *43 is *constituted by an agreement entitling one person to share the profits made by another to an indefinite extent: but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended.

8. That in these, as in all other cases, the courts will be astute to defeat fraud, and to hold partnerships to be created if they are intended, although the intention may be carefully concealed.

The 1st, 2d, 4th and 6th of these rules appear to be warranted by Cox *v.* Hickman and Mollwo March & Co. *v.* Court of Wards; the 3rd and 5th by older authorities, not touched by those decisions; the 7th is probably the most correct mode of expressing the effect of Cox *v.* Hickman and Mollwo March & Co. *v.* Court of Wards on Waugh *v.* Carver, and other cases of that class; the 8th speaks for itself, and is illustrated by Pooley *v.* Driver, which will be noticed presently.

3. *The act of* 28 & 29 *Vict. c.* 86.

In order to remove the difficulties which it was felt might be created by the decision in Cox *v.* Hickman, the act of 28 & 29 Vict. c. 86, was passed. This act (commonly called Bovill's act) is entitled, "An Act to amend the law of Partnership." It received the Royal assent on the 5th of July, and enacts as follows:

28 & 29 Vict. c. 86.

1. The advance of money by way of loan to a person engaged, or about to engage, in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, *of itself*, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking,

shall, *of itself*, render such servant or agent responsible as a partner therein, nor give him the rights of a partner. (*k*)

*3. No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity, a portion of the profits made by such trader in his business, shall, *by reason only of such receipt*, be deemed to be a partner of or to be subject to any liabilities incurred by such trader. *44 28 & 29 Vict. c. 86.

4. No person receiving by way of annuity, or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good will of such business, shall, *by reason only of such receipt*, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

5. In the event of any such trader as the aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a good will as aforesaid, be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the said trader for valuable consideration in money or money's worth, have been satisfied. (*l*)

6. In the construction of this act, the word "person" shall include a partnership firm, a joint-stock company and a corporation. Interpretation of "person."

Upon the foregoing enactment it is to be observed:

1. That it applies to an extremely limited number of cases, and leaves wholly untouched a large number of agreements of common occurrence, *e. g.*, all such as had to be dealt with in Waugh *v.* Carver, Smith *v.* Watson, Cheap *v.* Cramond, and Cox *v.* Hickman. All such cases, however, must now be dealt with on the principles laid down by the House of Lords in the last named case. (*m*)

2. That it in no way modifies the doctrine by which persons who hold themselves out as partners incur the liabilities of partners.

3. That to entitle a person lending money to the benefit of the act, there must be a contract in writing; and it seems that such contract must be signed. (*n*)

4. That in the case of servants, agents, widows, and children, and of persons selling a good-will, there is no necessity for any contract in writing.

(*k*) Quære, if this deprives him of a right to an account? See Harrington *v.* Churchward, 6 Jur. N. S. 576. The object of the act was not to deprive the servant of his rights against his master, but to protect each from liability to third parties by reason of the acts of the other.

(*l*) See *Ex parte* Mills, 8 Ch. 569.

(*m*) See Holme *v.* Hammond, L. R. 7 Ex. 218; Mollwo March & Co. *v.* Court of Wards, L. R. 4 P. C. 419

(*n*) Pooley *v.* Driver, 5 Ch. D. 458, where, however, there was only a draft contract.

5. That unless a retiring partner is brought within the
45* first, *second, or third section, he is in no better position than other persons.

6. That the persons within the 2nd and 3rd sections are not within the 5th.

7. That persons who lend money or sell good will in consideration of a share of profits cannot, in respect of such loan or profits, compete with other creditors upon a distribution of their debtors' assets. (*o*)

8. That the 3rd section only applies to widows and children of deceased traders: *i. e.*, it is presumed, of persons liable to be adjudicated bankrupt as traders.

9. That the 5th section does not deprive the lender of his right to retain any security he may take for his money. (*p*)

10. That the act may be made an instrument of fraud, if a person is allowed to lend a small sum in consideration of a large share of profits, and a large sum in consideration of fixed interest. In such a case if a fraud were intended, it would probably be defeated by holding the lender liable as a partner. But where there is no fraud, a person who has advanced money under the act, and has also *bonâ fide* made other advances not under it, can on the bankruptcy of the borrower prove for the latter advances, although not for the former. (*q*)

11. That it is apparent from the words "*of itself*" and "*by reason only*" in the first four sections of the statute, that it was not intended to relieve persons who are really partners (although dormant), from the liabilities incident to that position. Agreements intended to secure the benefit of the act to lenders of money are constantly framed with all sorts of clauses which expose them to the risks they are so anxious to avoid. In Syers *v.* Syers, (*r*) a badly drawn agreement intended to operate under the act, was held to create a partnership at will; and in Pooley *v.* Driver, a carefully drawn agreement, also intended to secure to a lender the protection of the act, signally failed so to do. This case is of such importance as to deserve special notice.

(*o*) *Ex parte* Corbridge, 4 Ch. D. 246.

(*p*) *Ex parte* Sheil, 4 Ch. D. 789.

(*q*) See *Ex parte* Mills, 8 Ch. 569.

(*r*) 1 App. Ca. 174.

In Pooley *v.* Driver, (*s*) A and B entered into partnership *for fourteen years with a capital of *46 30,000*l.*, of which 10,000*l.* was to be raised by way of loan under the above act. The capital was to be divided into 60 shares of 500*l.* each, of which 20 were to belong to the persons advancing the 10,000*l.*, in proportion to their advances. The net profits were to be also divided into 60 shares, of which 20 were to belong to the same persons in the same proportion. At the end of the partnership an account was to be taken in the usual way: the moneys advanced were to be returned; but if it appeared that the persons advancing the 10,000*l.* had received more than their shares of profits, the excess was to be refunded, but not to an amount exceeding their advances. C. advanced 2,500*l.* to A. and B. on the terms of an agreement, which incorporated the agreement between A. and B.; which provided for the employment of the capital (including C.'s advances) in the business, gave C. liberty to inspect and take copies of the partnership books, entitled him to five-sixths of the estimated annual profits of the business; and provided for a final account and re-payment at the end of the partnership of the 2,500*l.*, unless it should appear that he had received more than his share of profits, in which case he was to refund the excess, not exceeding his 2,500*l.* Pooley v. Driver.

There was also a clause empowering A. and B. to pay out the 2,500*l.* in the event of C.'s bankruptcy, or of any dispute between the parties, and an arbitration clause. This agreement with C. was drawn up in writing, but remained in draft, and was never signed. But D. also advanced money on the same terms, embodied in a written agreement duly signed by him and A. and B. It was held by Jessel, M. R: 1. That the unsigned draft agreement with C. was not a sufficient writing to bring the case within the statute; 2. That the signed agreement with D. did not entitle him to the protection of the statute; and 3, that, notwithstanding Cox *v.* Hickman, and that class of cases (*ante*, p. 38), both C. and D. were dormant partners, and liable as such for the debts of A. and B.

The Judgment in this case is very important, and well

(*s*) 5 Ch. D. 458. Compare this with Mollwo March & Co. *v.* Court of Wards, L. R. 4 P. C. 419, noticed *ante*, p. 41; *Ex parte* Delhorse, 7 Ch. D. 511, noticed *ante*, p. 22, note; and with *Ex parte* Tennant, 25 W. R. 854, S. C. 6 Ch. D. 303, where a father claimed to be a partner with his son, contrary to the true meaning of an agreement framed to avoid a partnership.

*47 *deserves attentive study. It proceeded upon the ground that partnership is *primâ facie* the result of participation in profits; and that the true result of the whole arrangement was that the advances were not real loans, but were in truth contributions of capital under color of loans.

Observations on Pooley v. Driver.

One of the most remarkable features of this case was that, when the time arrived for the re-payment of the advances, it might be found that not only was there nothing to repay, but that the so-called lenders might have to refund part of what they had already received, even to the extent of their so-called loans. (*t*) This practically amounted to a possible loss of their advances, and distinguished the case at once from a true contract of loan; for in such a contract the money lent is to be re-paid intact, and the only risk run is the insolvency of the borrower. (*u*)

2. *By holding himself out as a partner.*

Persons who hold themselves out as partners, incur the liabilities of partners.

The other mode in which a person not a partner becomes liable as if he were one, is by so conducting himself as to lead other people to suppose that he is willing to be regarded by them as if he were a partner in point of fact.[1] The principle of this is obvious

(*t*) See the clauses, 5 Ch. D. 463, 466, and the comment on them at p. 492.

(*u*) See *ante*, p. 23.

[1] To establish a liability against a party as a partner, for the acts of others, it must be made to appear that a co-partnership was formed by express agreement, or that there was an authorization in advance and a consent to be bound by such acts as a partner, or a ratification of the acts after performance, with full knowledge of all the circumstances, or some act by which an equitable estoppel has been created. Central City Savings Bank *v.* Walker, 66 N. Y. 424.

As to the liability of stockholders in cases of defective incorporation, or after the expiration of the charter, etc., see, *ante*, p. 4, note.

Where an individual represents himself as a partner in a certain firm, or permits others so to do, or to hold him out as such, or by his acts or declarations, creates in the mind of another a reasonable belief that he is a member of a certain firm, he is liable to the person so believing, on a *bonâ fide* contract made by the latter with a member of such firm, as such, in the regular course of such business, although in fact no such partnership existed. Dailey *v.* Coons, 64 Ind. 545; Dodd *v.* Bishop, 30 La. An. 1178; Buckingham *v.* Burgess, 3 McLean, 364, 549; Benedict *v.* Davis, 2 Id. 347; Bowie *v.* Maddox, 29 Ga. 285; Fisher *v.* Bowles, 20 Ill. 396; Sherrod *v.* Langdon, 21 Iowa, 518; Grieff *v.* Bondonsquie, 18 La. Ann. 631; Gumbel *v.*

and satisfactory, and is well laid down by C. J. Eyre, in the great case of Waugh *v.* Carver. (*x*) His Lordship there said:

"Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners, that A. is to contribute neither labour nor

Abrams, 20 Id. 568; Mershon *v.* Hobensack, 22 N. J. L. 372; Craige *v.* Warren, 3 Phil. 298; Furber *v.* Carter, 11 Humph. 271; Crozier *v.* Kirker, 4 Tex. 252; Stearns *v.* Haven, 14 Vt. 540; Bragman *v.* McGuire, 32 Ark. 733; Mathews *v.* Felch, 25 Vt. 536; Rice *v.* Barrett, 116 Mass. 312; Thomas *v.* Green, 30 Md. 1; Barnett Line of Steamers *v.* Blackmar, 53 Ga. 98; Cottrill *v.* Vanduzen, 22 Vt. 511; Hicks *v.* Cram, 17 Vt. 449; Craig *v.* Alverson, 6 J. J. Marsh. 609; Markham *v.* Jones, 7 B. Mon. 456; Wabrath *v.* Viley, 2 Bush. 478.

Where several persons engage in an enterprise, one of them agreeing to assist by advancing money, and to share in the losses, if any, but not to receive any part of the profits, which are to be divided among the others exclusively, although such one is not to be deemed a partner as between the others and himself, nevertheless, if he holds himself out or allows himself to be held out as a partner to a third person, who, under the belief that he is such, enters into a contract with them, he is liable upon such contract. Moss *v.* Jerome, 10 Bosw. 220.

Where two persons authorize a third to represent and hold himself out as a partner with them, and in pursuance thereof he does so, this is as much their holding themselves out as such partners as if the same representations had been made by them in person. Hinman *v.* Little, 23 Mich. 434.

Where an obligation, signed by two persons with defendant, is, on his representation that he is a member of a partnership, exchanged for another signed by the latter alone, he cannot, in an action by the holder, deny that he is a partner. Burbank *v.* Haas, 9 La. Ann. 528.

Where two out of three partners gave a note, in the name of the two, as a distinct firm, but the three, in the course of their business, induced the belief that such was their firm name: *Held*, that the three were liable as partners, on the note. Tams *v.* Hitner, 9 Pa. St. 441.

A represented to B that C was his nephew, and that they intended to purchase some cattle together. Afterwards C presented to B an order purporting to be signed by A, stating that he had bought the cattle, and asking a loan of $900. A denied that the signature to the order was genuine, and B admitted that it was not genuine: *Held*, that it was competent to prove the representations made by A in regard to his relations to C, and that if they were such as to create a belief in the mind of an ordinarily prudent man, that he would be responsible for money advanced to C, he is estopped from denying such liability. Peck *v.* Lusk, 38 Iowa, 93.

The defendants agreed to enter into copartnership with each other as produce commission merchants, the business to commence as soon as one of the number should receive and pay in $6,000. The money was not paid in, but nevertheless, an office was taken by the parties, upon which a sign was placed containing the

(*x*) Waugh *v.* Carver, 2 H. Blacks. 235. The principle will be found stated to the same effect in *Ex parte* Watson, 19 Ves. 461; *Ex parte* Matthews, 3 V. & B. 125; De Berkom *v.* Smith, 1 Esp. 29.

money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to

name of the firm, and bill-heads were printed and a set of books opened in the firm name, without any objection on the part of either of the partners, or any attempt to repel the idea of a partnership. One of the partners in the name of the firm made an agreement with H., by which the latter was employed as a traveling agent of the firm, his compensation neing a part of the profits of the business he should obtain; and the firm agreed to accept and pay H.'s draft upon them in favor of the plaintiff, for the amount H. owed to the plaintiff: *Held*, 1. That the defendants had by their acts and language held themselves out and represented themselves to H. as partners, and as to the business with him they acted as partners, and he believed them to be and dealt with them as such. 2. That the ageement with H., though made by one of the partners without the knowledge of the others, being within the legitimate business of the firm, was as binding upon the firm as it would have been had all assented to it. Burns *v.* Rowland, 40 Barb. 368.

Partners to run a saw-mill, make and sell lumber and carry on the lumber business generally, as the latter generally includes the buying of timber as well as the selling of lumber, are commercial partners. Copley *v.* Lawhead, 11 La. Ann. 615.

Parties buying materials and manufacturing them into carriages for sale are commercial partners; but mechanics making carriages to order, or repairing them, are not necessarily so. Cowand *v.* Pulley, 11 La. Ann. 1.

Although a purchase of property be on separate and not on joint account, yet if the interests of the purchasers are afterwards mingled with a view to a joint sale, a partnership exists from the time that the shares are brought together. Rogers *v.* Nichols, 20 Tex. 719.

Where grain, received at a mill as toll, was mixed up, and became the subject of traffic between the defendants, each being part owner, and interested in the proceeds of the sale: *Held*, that they were partners in that particular business. Benson *v.* M'Bee, 2 McMull. 91.

If four persons, by an agreement in writing, enter into an association for the manufacture of paper, providing for the purchase of stock and the sale of paper indefinitely, they are partners in the business, although there is no express stipulation to share profit and loss, as that is an incident to the prosecution of their joint business. Barrett *v.* Swann, 17 Me. 180.

The owner of a quartz-mill leased land adjacent to the mill, and contracted to crush ore for his tenants, and run it into their amalgamating works on the leased premises, for a fixed price per ton; and also agreed to supply the tenants' works with motive power at a stipulated price: *Held*, that the landlord did not thereby become a partner with his tenants. Mears *v.* James, 2 Nev. 342.

F. sued H. to charge him as a partner with M. for advances made upon consignment of snuff. H. denied liability with M. as a partner: *Held*, that if M. and H. purchased on joint account, and shipped the snuff to be sold on joint account, then they are liable jointly, but that if they were not jointly concerned in the sale, the conduct of M. in making the shipment on joint account, if not done with the knowledge of H, could not make it a partnership transaction. Felichy *v.* Hamilton, 1 Wash. C. C. 491.

The rule as to the joint liability of

suppose that they lent their money upon the apparent credit of three or four persons, when, in fact, they lent it only to two of them, to whom without the others they would have lent nothing."

two persons holding themselves out to a party with whom they are dealing as partners, applies to two firms assuming to constitute but one firm. Beall *v.* Lowndes, 4 S. C. 258.

H. and Harrington were never partners, and no such firm as H. & Co. ever existed; but Harrington gave plaintiff a note for some staging property purchased by him, signed "H. & Co., by Harrington," without the knowledge of H. Two or three years before said note was given, H. was informed that Harrington was using the name of H. & Co. in his staging business, and he afterwards saw Harrington and told him he must not use that name to injure him, and he said he would not. The plaintiff did not know of such previous use of that name at the time said note was given, and it did not appear whether Harrington made any representations to him at that time: *Held*, that H. was liable on said note. Smith *v.* Hill, 45 Vt. 90.

Three parties agreed in writing "to enter upon an operation embracing the purchasing and selling of shingles," one to purchase and the other two to receive and sell them, and the shingles to be the property of these two, and all the capital to be furnished by them, but the profits and losses to be equally divided among the three: *Held*, that the three were partners as to third persons. Getchell *v.* Foster, 106 Mass. 42.

A person agreed, in writing, to lend to a firm of furniture manufacturers, his notes for $15,000, in consideration of their transfer to him of their entire stock, fixtures, debts, good will, etc., with a view that they, as his agents, close the business, and deliver to him the proceeds, the same to pay, firstly, their outstanding liabilities; secondly, his notes; and the balance, if any, to them: *Held*, that such person was not liable for articles afterwards purchased by them in their own name to complete unfinished work. His frequent presence at the store, seeing the work go on, raised no presumption of silent partnership or of an implied contract to pay for the articles. Noblit *v.* Bonaffon, 81 Pa. St. 15.

If two persons occupy the same store, for the same business, and hold themselves out as partners, they will be responsible as partners to third persons for goods purchased and used for the benefit of the firm, whatever may be their agreement with each other, even though such third persons suppose themselves to be giving credit to one alone. Smith *v.* Smith, 27 N. H. 244.

When two or more persons agree to become partners, and actually proceed to carry into execution the joint undertaking, the relation of the partners will exist as to third persons, although the conditions of the partnership are not understood alike by the partners. Cook *v.* Carpenter, 34 Vt. 121.

In an action against a person, charging him as a partner, it is competent for him, in exoneration of himself, to introduce the original articles of co-partnership, of which he is alleged to have been a member. Hunn *v.* M'Kee, 4 Ired. L. 475.

In an action against the brewery firm of G. & Co., of which F. was a member, for labor, etc., in fitting up a restaurant some miles from their brewery, the defense being misjoinder in that the restaurant was F.'s alone, and the plaintiff having proved that G. was present at the fitting up of the restaurant and ordered the sign thereof to be painted "G. & Co.," and that G. had delivered beer from the brewery in payment therefor:

*48 *The doctrine that a person holding himself out as partner and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is

Held, that the books of the brewery were inadmissible to show in rebuttal that the beer so paid was charged to F. Ganzer *v.* Fricke, 57 Pa. St. 316.

Wherein an action against two, charging them as partners, evidence has been given to prove that one who denies his liability as a partner, had so held himself out as a partner as to enable the other defendant to pledge their joint credit, if he chose, evidence is admissible to prove that the latter, in the absence of the former, represented the former to be his partner, to the plaintiffs, as tending to prove that the plaintiffs relied on the joint credit of the two, and to rebut evidence previously introduced by the defendants, tending to prove that the plaintiffs relied upon the credit of one of the defendants and of a third person. Hicks *v.* Cram, 17 Vt. 449.

A person cannot give himself credit as a partner of another, by holding himself out as such, without the consent, express or implied, of such other person. Crook *v.* Davis, 28 Mo. 94.

A person who is not a partner, but has become by circumstances liable as partner, does not thereby acquire any of the rights of a partner. His separate property, in case of insolvency, must be administered by his trustee, according to the insolvent laws. Glenn *v.* Gill, 2 Md. 1.

If one holds himself out to be a partner of another, that does not make him, in fact, a partner, nor render him liable as such, except to those who are thereby led to believe he is a partner, and who give credit to the supposed firm upon such belief. Wood *v.* Pennell, 51 Me. 52; Irvin *v.* Conklin, 36 Barb. 64.

The fact that a certain number of persons held themselves out as partners in the transaction of their business, will, *primâ facie*, establish a partnership in an action by the parties against third persons, or by one standing in the same position. McCarthy *v.* Nash, 14 Minn. 127.

Facts which will make persons partners as to third persons, are not always enough to render them partners between themselves. The mere fact that a person puts a certain amount of money into a business, and permits his name to be used as a partner, will not make him a joint owner of the goods used in the business, unless that was so agreed and understood at the time he so placed his money, and permitted the use of his name. It does not render the goods partnership property, so as to affect the right of the original owner to recover on a policy of insurance issued to him. Lycoming Ins. Co. *v.* Barringer 73 Ill. 230.

Where several common carriers, each having its own line, associate and form what, to the shipper, is a continuous line, and contract to carry goods through at an agreed price, which the shipper pays in one sum, and which the carriers divide among themselves, then they are jointly and severally liable to the shipper with whom they have contracted, for a loss taking place on any part of the whole line, and the word "partners," or any particular word to describe the relation existing between the carriers, need not be in the petition. Wyman *v.* Chicago & Alton R. Co. 4 Mo. App. 85.

A line of stage-coaches was run by the two defendants, from Barre, through Holden, to Worcester, and back, and it was agreed that one of them should furnish and maintain horses and coaches, and receive the money paid for the transportation of passengers between Holden and Worcester, and that the other should

nothing more than an illustration of the general principle of estoppel by conduct acted on and explained in Pickard *v.* Sears and Free-

do the like between Holden and Barre. They hired a man to drive all the way from Barre to Worcester, and back, for a certain sum per month, and perquisites; and money was delivered by the plaintiff to this driver to carry from Barre to Worcester, but he absconded without delivering it: *Held*, that the driver was the servant of the defendants jointly, and that they were jointly liable to the plaintiff for the money. Cobb *v.* Abbot, 14 Pick. 289. See, also, Dwight *v.* Brewster, 1 Pick. 50.

Where three persons run a line of coaches, over a route which is divided into three sections, the occupant of each paying the expenses of his own section, but the money received as fare of the passengers, deducting tolls, being divided among the parties, in proportion to the distances run by each, they are jointly liable as co-partners, to a third person, not a passenger, for an injury received through the negligence of the driver of a coach of one of them. Champion *v.* Bostwick, 18 Wend. 175.

A pool arrangement between the owners of different steamboats, whereby the excess of net earnings of one boat over the other is to be divided at the end of the season, does not, alone, constitute a partnership so as to create a joint liability for the negligence of either. Fay *v.* Davidson, 13 Minn. 523.

If the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not, of itself, constitute them partners as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line. Ellsworth *v.* Tartt, 26 Ala. 733.

Where there were three distinct companies of passenger carriers, one on the Atlantic, one on the Isthmus, and one on the Pacific, forming one connected line, and included by the agent in one advertisement, but each issuing separate tickets, and having no joint interest in the passage-money, or joint liability for loss: *Held*, that this did not constitute a partnership. Briggs *v.* Vanderbilt, 19 Barb. 222.

If an arrangement is made between several connecting lines of transportation for carrying goods, by which each carrier subsequent to the first pays what is due for freight when the goods are delivered to him, and the last carrier collects the whole bill of the consignee, though these accounts are settled periodically, and each route stipulates to charge only certain rates, such an arrangement does not constitute a partnership or joint liability, and each line is liable only for injury caused by its own negligence. Darling *v.* Boston, &c. R. R. Corp. 11 Allen. 295.

A contract between carriers of connecting routes to carry goods over the continued line and divide the freight money of goods so carried, is not a contract of partnership, and an action by one of them for freight will not be dismissed for the non-joinder of the other. Merrick *v.* Gordon, 20 N. Y. 93.

A contract between a railroad company and individuals engaged in transporting merchandise to and from the termini of the railroad, relating to such transportation, will not make them partners. Mohawk R. R. Co. *v.* Niles, 3 Hill (N. Y.), 162.

The plaintiff was a member of the society known as "The Patrons of Husbandry," and the defendants members of the "State Grange" of the same organization. The action was upon an alleged breach of warranty in the sale

man *v.* Cooke. (*y*) It is therefore wholly immaterial whether the person holding himself out as a partner, does or does not share the profits or losses. (*z*)[1] Nay, more, even if it be known that he does not share either, still he may be liable. For although a person who lends his name may stipulate for an indemnity from those who use it, it by no means follows that he ought not to be liable to third parties merely because they are aware of such stipulation. His name does not induce credit the less on account of his right to be indemnified by others against any loss falling in the first instance on himself; and although, in the case supposed, he cannot be believed to be a *partner*, the lending of his name does justify the belief that he is willing to be responsible to those who may be induced to trust to him for payment. (*a*)

Effect of knowledge that a person who holds himself out as a partner is not a partner.

However, in Alderson *v.* Pope (*b*), Lord Ellenborough held, "that where there was a stipulation between A., B. and C., who appeared to the world as co-partners, that C. should not participate in the profit and loss, and should not be liable as a partner, C. was not liable as such to those who had notice of this stipulation, and that notice to one member of a firm was notice to the whole partnership." The report of this case states no more than what is here extracted, and the reader is left in doubt as to the meaning of the words "should not be liable as a partner." If these words meant that C. was to be indemnified by A. and B., the observations already made show, it is conceived, that the decision was erroneous. But if they meant that C. would not

Alderson *v.* Pope.

of a "Werner Harvester," by one McKaig, the State agent of "The Patrons of Husbandry," appointed by the "State Grange": *Held*, that as to members of the subordinate "Granges," whose representatives they were, the defendants were not partners, nor liable for the acts of said agent. Edgerly *v.* Gardner, 1 N. W. Rep. N. S. 1004; S. C. 9 Neb. 130.

(*y*) Pickard *v.* Sears, 6 A. & E. 469; Freeman *v.* Cooke, 2 Ex. 654.

(*z*) *Ex parte* Watson, 19 Ves. 461. See, also, Kirkwood *v.* Cheetham, 2 Fos. & Fin. 798, where A. was B.'s agent, and A. held himself out as B.'s partner; both A. and B. were decided to be liable for goods supplied to A. for B. Compare Hardman *v.* Booth, 1 Hurls. and Colt. 803.

[1] When a party permits another to hold him out as partner, and thereby procure credit on the strength of his supposed relation, neither community of interest nor participation in the profits is necessary to render him liable as partner. *In re* Jewett, 15 Bank. Reg. 126.

(*a*) See acc. Brown *v.* Leonard, 2 Chitty. 120.

(*b*) 1 Camp. 404, note.

be liable at all to third parties for the acts of A. and B., then the question would arise whether this *was not altogether *49 inconsistent with C.'s conduct, and whether the maxim *protestatio facto contraria non valet* would not apply. In any point of view, the reported note of the case is unsatisfactory.

Effect of fraud.

Moreover, if a person has been induced by promises of irresponsibility or by fraud to hold himself out as a partner with others, this circumstance does not relieve him from liability to third parties who have been induced by his conduct to trust him as well as them, and who have had nothing to do with the promises or fraud practiced upon him. (*c*)

Observations on the phrase holding out.

The expression in Waugh *v.* Carver, "if he will lend his name as a partner, he becomes as against all the rest of the world a partner," requires qualification; for the real ground on which liability is incurred by holding oneself out as a partner is, that credit has been thereby attained. This was put with great clearness by Lord Wensleydale in Dickenson *v.* Valpy (*d*), in which he said,—"If it could have been proved that the defendant had held himself out to be a partner, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff arising from his conduct as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement. (*e*)

Dickenson v. Valpy.

What constitutes a holding out.

Further, a person may hold himself out or permit himself to be held out as a partner, and yet conceal his name.[1] He may be referred to as a person who does not wish to

(*c*) See Collingwood *v.* Berkeley, 15 C. B. N. S. 145; Maddick *v.* Marshall, 15 C. B. N. S. 387, and 17 ib. 829; Ellis *v.* Schmæck, 5 Bing. 521; *Ex parte* Broome, 1 Rose, 69. It will be seen hereafter that persons induced to join companies, by the false and fraudulent statements of directors, cannot on that ground escape from liability to creditors.

(*d*) 10 B. & C. 140.

(*e*) See, too, Vice *v.* Anson, 7 B. & C. 409, where the defendant held herself out as a partner, but not to the plaintiff.

[1] A person who is held out as a partner, or as a dormant partner, may, although he has not signed the articles of partnership, be sued and held jointly with those who did sign them. Wood *v.* Cullen, 13 Minn. 394.

have his name disclosed; and if he is so referred to by his *50 authority he *will incur liability as a *quasi*-partner. (*f*) But it follows, from the principles above explained, that a person cannot be liable on a contract, on the ground that he held himself out as a partner, unless he did so before the contract was entered into. (*g*)[1] It also follows that no person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz., first, the alleged act of holding out must have been done either by him or by his consent,[2] and secondly, it must have been known to the person seeking to avail himself of it.[3] In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled.

As illustrative of these propositions, reference may be made to Fox *v.* Clifton, Pott *v.* Eyton, Newsome *v.* Coles, and Edmundson v. Thompson.

Fox v. Clifton.

In Fox *v.* Clifton (*h*), certain persons resolved to form a company with a capital of 600,000*l.* in 12,000 shares at 50*l.* each. The defendants applied for shares, which were allotted to them, and their names were entered in a book made up by the

(*f*) Martin *v.* Gray, 14 C. B N. S. 824. See, also, Maddick *v.* Marshall, 16 ib. 387, and 17 ib. 829.

(*g*) Baird *v.* Planque, 1 Fos. & Fin. 344.

[1] Where there is no evidence to charge the defendant as a partner, except his representation made after the delivery of the goods, the jury are authorized, if not required, to find for the defendant. Palmer *v.* Pinkham, 37 Me. 252.

[2] In order to render a party liable on the ground that he has been held out as partner, he must have had notice of his being so held out, or there must be circumstances from which notice can be presumed. *In re* Jewett, 15 Bank. Reg. 126; Felichy *v.* Hamilton, 1 Wash. C. C. 491.

One who has been engaged in carrying on business in the name and ostensibly as a member of a firm, cannot set up as against his own acts the non-existence of the firm by reason of a want of consent in one of its members. McStea *v.* Matthews, 50 N. Y. 167.

[3] See Wright *v.* Powell, 8 Ala. 560; Heffner *v.* Palmer, 67 Ill. 161.

The mere fact that one is interested in the purchase of horses by another, will not render him liable to a seller thereof as partner; there must be some proof, although slight, that the seller knew that he had held himself out as a partner in the transactions. Heffner *v.* Palmer, *supra*.

(*h*) 6 Bing. 776. The judgment in this case deserves attentive perusal. The long extract given in former editions is here omitted, as there are comparatively few companies, the effect of whose registers does not turn on some statute. Compare Maddick *v.* Marshall, 16 C. B. N. S. 387, and 17 ib. 829.

secretary of the company and kept at its counting-house. The plaintiff, before he did the work for which he sued the defendants, applied to the secretary to know of what persons the company consisted, and the plaintiff was shown the book in which the defendants' names were; but it did not appear whether the plaintiff saw their names or not, nor was there any evidence to show that they had authorized the production of the list, or of their names to strangers. The plaintiff sought to make the defendants liable on the ground (amongst others) that they had held themselves out as partners; but they were held not to be liable.

In Pott *v.* Eyton, (*i*) which has already been referred to on * another point, Jones managed a shop for Eyton, paying him a percentage on the amount of all sales. Eyton's name was over the door, (*k*) and licenses to sell tea, etc., were taken out in his name. Jones had other shops in the neighborhood with which Eyton had no concern, and had an account in his own name at the plaintiff's bank. The account was overdrawn, and it was sought to recover from Eyton the balance due to the bank on the ground, amongst others, that he had held himself out as a partner with Jones. There was, however, nothing to show that the bankers knew that Eyton's name was over the door of one of Jones' shops, or that licenses were taken out in Eyton's name, or that the bankers ever supposed him to be a partner with Jones, or that they had ever, in fact, given any credit to Eyton. The jury found that Eyton had not consented to have his name held out as a partner, or to have his credit pledged to the bank, and the defendant had a verdit which the Court refused to disturb, inasmuch as it appeared from the evidence that the bankers had looked only to Jones.

*51 Pott v. Eyton.

Holding out, but not to the plaintiff.

In Newsome *v.* Coles (*l*), a firm of four partners carried on business under the name of Thomas Coles and Sons. Thomas Coles died, but the three sons carried on business in the old name for a few years; they then dissolved partnership, two of them establishing a new business and the other continuing the old business alone, but in the old name. The dissolution was advertised in the *Gazette*. The plaintiff, who did not know of the dissolution, but had had no dealings with the firm before its disso-

Newsome v. Coles.

(*i*) 3 C. B. 32, and *ante*, p. 38.
(*k*) Relied on in Williams *v.* Keats, 2 Stark. 290.
(*l*) 2 Camp. 617.

lution, sought to make all three brothers liable on a bill accepted after the dissolution by the one brother, who continued to trade under the old name, and had accepted the bill in that name. The two other brothers, however, had never held themselves out to the plaintiff that they were partners in any firm of the name of Thomas Coles and Sons; they had done nothing to authorize the use of that name after the dissolution; at the same time they knew that the old name was still used, and they had taken no steps to prevent such use. This, however, it was held they were not bound to do, and the *52 *plaintiff failed. The case would have been decided differently if the plaintiff had been a customer of the firm before its dissolution, for in that case he would have been justified in supposing that there had been no change in the firm. (*m*)

Continued use of old name after retirement of partner.

A more recent case to the same effect is Edmundson *v.* Thompson. (*n*) There a partnership was contemplated between the two defendants, Thompson and Blakey, but no partnership between them actually existed. Blakey, nevertheless, acted in the management of the business as a partner might have done; he was to receive a salary equal to one-third of the profits; he used and wrote in the name of Thompson & Co., and he told several people that he was a partner; and the plaintiff moreover was told by Thompson, that he and Blakey were partners. Blakey, however, had never held himself out to the plaintiff as a partner, and had not authorized Thompson to represent that a partnership existed; and it was therefore decided, that Blakey was not liable to be sued for goods supplied by the plaintiff to Thompson in the ordinary course, and for the purposes of his business.[1]

Edmundson *v.* Thompson.

Plaintiff told that defendant was a partner.

If a partner dies, and the surviving partners continue the old business in the old name, this will not have the effect of rendering the estate of the deceased liable, even to

Holding out by surviving partner.

(*m*) See the note in 2 Camp. 620.

(*n*) 2 Fos. & Fin. 564, and 8 Jur. N. S. 235, Ex. See, also, Cornelius *v.* Harrison, 2 Fos. & Fin. 758.

[1] One who knowingly permits his name to be used as a member of a trading firm, under such circumstances as to mislead a stranger who deals with the firm, on the faith that he is liable as a partner, is liable as such: Campbell *v.* Hastings, 29 Ark. 512; Carmichael *v.* Grier, 55 Ga. 116.

Diligence in ascertaining and contradicting the report is not, however, required of one who is held out as a member of a partnership without his knowledge. Campbell *v.* Hastings, 29 Ark. 512. See, also, Poillon *v.* Secor, 61 N. Y. 456.

old customers or correspondents of the firm for acts done by the survivors after the death of their late co-partner. The doctrine of holding out has never been applied to such a case, and the executor of the deceased incurs no liability by the continued use of the old name. (*o*)[1] Even if the executor is the surviving partner using the old name, that will not make any difference; for although as executor he can give a lien on his testator's estate, ordinary debts contracted by him do not charge it. (*p*)

Application of doctrine to inchoate partnerships, &c.

A person who holds himself out as willing to become a partner does not incur liability by so doing. Although a person who represents himself to be a partner, is properly held *liable as a partner to persons who *53 have acted on the faith of his being so, it would be in the highest degree unjust to confound a representation by a person that he intended to become a partner, with a representation that he was one in point of fact, and to hold him as much liable to third parties for the one representation as for the other. This distinction was recognized and acted on in Bourne *v.* Freeth (*q*), where the defendant who had signed a prospectus containing the terms on which it was proposed to form a company, was held not to have held himself out as a shareholder therein.

Holding out, a question of fact.

Whether a defendant has or has not held himself out to the plaintiff, is in every case a question of fact, to be determined by a jury, and the consequence is, that there is great apparent conflict in the cases on this head.[2] In Wood *v.* The Duke of Argyll (*r*), and in Lake *v.* The Duke of Argyll (*s*), the very same acts were relied on as a holding out, viz., being advertised as president of a society, acting as president at a meeting,

(*o*) See Webster *v.* Webster, 3 Swanst. 490; Devaynes *v.* Noble (Houlton's case), 1 Mer. 616; Vulliamy *v.* Noble, 3 Mer. 614.

[1] The surviving members of a partnership created by contract, who, after its dissolution, by a partner's death, do not give themselves out to the world as commercial partners, are not bound *in solido* with those who do. Cooper *v.* Burns, 6 La. Ann. 740.

(*p*) See Farhall *v.* Farhall, 7 Ch. 123; Owen *v.* Delamere, 15 Eq. 134; but see Vulliamy *v.* Noble, 3 Mer. 614.

(*q*) 9 B. & C. 632. See, too, Reynell *v.* Lewis, 15 M. & W. 517, and Wyld *v.* Hopkins, ib. Compare Martyn *v.* Gray, 14 C. B. N. S. 824.

[2] In a suit against partners, the jury are not called on to decide whether the partnership actually existed, but only whether it was held out to the plaintiffs as existing: Young *v.* Smith, 25 Mo. 341; Shackleford *v.* Smith, Id. 348; Stephenson *v.* Cornell, 10 Ind. 475.

(*r*) 6 Man. and Gr. 928.

(*s*) 6 Q. B. 477.

and signing some resolutions then agreed upon; in the first case, this was considered not sufficient and the defendant had a verdict; whilst, in the last, it was considered to be sufficient and the plaintiff had a verdict. The jury was asked whether the defendant had held himself out as intending to pay for the work charged, and the question was answered in the affirmative in the one case, and in the negative in the other, and the Court in each case refused to disturb the verdict.

Defendant held out by others.

The most difficult cases of this class occur where the defendant has not held himself out but where he has been held out by others, and he alleges that they had no authority to do so. Express authority is not necessary; authority to be inferred from his conduct is amply sufficient (*t*); and if a person has by signing prospectuses or allowing his name to be put to them (*u*), or by being party to resolutions (*x*), or by his own statements, though not intended to be repeated (*y*), or has in any other *54 *way so conducted himself as in the opinion of a jury to have justified the holding out which he repudiates, he will not escape liability.

Observations on the liabilities of promoters of companies, &c.

It cannot be too carefully borne in mind in all cases of this description, that a person who is neither a partner nor a *quasi*-partner, is liable on the general principles of agency, for acts done by others with his authority, express or implied. If, therefore, members of committees, managers of clubs, or any other persons not in partnership, pass resolutions that work shall be done or goods supplied, they authorize whatever may be done in pursuance of such resolutions, and they are the persons naturally looked to, and *primâ facie* liable to pay for what may be so done. (*z*) The question in these cases is simply one of agency, and the question of partnership or no partnership is immaterial, save that if a partnership can be established, the liability of one member for the acts of the others in the prosecution of their common object follows almost as a matter of course.

(*t*) See the last two cases.

(*u*) Collingwood *v.* Berkeley, 14 C. B. N. S. 145.

(*x*) Maddick *v.* Marshall, 16 C. B. N. S. 387, and 17 ib. 829.

(*y*) Martyn *v.* Gray, 14 C. B. N. S. 824.

(*z*) See the cases in the last five notes, and Doubleday *v.* Muskett, 7 Bing. 110; Braithwaite *v.* Skafield, 9 B. & C. 401; Burls *v.* Smith, 7 Bing. 705.

SECTION III.—OF SUB-PARTNERSHIPS.

A sub-partnership is, as it were, a partnership within a partnership; it pre-supposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes a partnership between the parties to the agreement. If, therefore, several persons are partners, and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm.[1] The result of such an agreement is to constitute what is called a *sub-partnership*, that is to say, it makes the parties to it partners *inter se;* but it in no way affects the other members of the principal firm. In the language of Civilians, *Socius mei socii, socius meus non est.* (*a*) In *Ex parte* Barrow (*b*), Lord Eldon puts the law on this subject very clearly: "I take it," * he says, "to have been long since established, *55 that a man may become a partner with A, where A and B are partners, and yet not be a member of that partnership which existed between A and B. In the case of Sir Chas. Raymond, a banker in the city, a Mr. Fletcher, agreed with Sir Chas. Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held that he was no partner in that partnership; had no demand against it; had no account in it; and that he must be satisfied with a share of the profits arising and given to Sir Chas. Raymond." (*c*)

Sub-partnerships.

Socius mei socii, socius meus non est.

Before the decision of the House of Lords in Cox *v.* Hickman, (*ante*, pp. 38–43), a sub-partner might perhaps have been liable to the creditors of the principal firm by reason of his participation in the profits thereof; but since that

Liability to creditors.

[1] An agreement between a partner in a firm and a third person, that the latter shall receive a share of the partner's share of the profits, and contribute towards his share of losses, does not make the third person a partner in the firm, either among themselves or as towards others. Burnett *v.* Snyder, 43 N. Y. Superior Court, 238; Reynolds *v.* Hicks, 19 Ind. 113; Newland *v.* Tate, 3 Ired. Eq. 226.

See, however, *contra* as to creditors, Fitch *v.* Harrington, 13 Gray, 468, *ante* p. 33 note.

(*a*) See Pothier, Partn. § 91.

(*b*) 2 Rose, 252.

(*c*) See, too, Bray *v.* Fromont, 6 Madd. 5; *Ex parte* Dodgson, Mont. & Mc'Ar. 445.

decision such a liability cannot, it is conceived, attach to him. (*d*)

SECTION IV.—OF GENERAL AND PARTICULAR PARTNERSHIPS.

Universal partnerships.

It is customary for writers on partnership law to divide partnerships into universal,[1] general, and particular (or special or limited), according to the extent of the contract entered into by the members. The classification is traceable to a passage in the Digest—"*Societates contrahuntur sive universorum bonorum, sive negotiationis alicujus, sive vectiaglis, sive etiam rei unius*" (*e*)—and is not worth enlarging upon, except for the purpose of distinguishing cases in which persons are partners in some trade or business generally, from those in which they are partners in some particular transaction or adventure only.

If persons who are not partners agree to share the profits and

(*d*) See on this subject Scotch case of Fairholme *v.* Marjoribanks, 3 Ross, L. C. on Com. Law, 697.

[1] The evidence to support the existence of a universal partnership, alleged by a surviving partner, must be very clear. Gray *v.* Palmer, 9 Cal. 616.

Where two brothers entered into partnership without written articles, and continued in partnership, greatly extending their business, and dealing in various kinds of business for 30 years or more: *Held*, that the partnership must be considered to be general and unlimited, and that all their property of every description was held in common. Lyman *v.* Lyman, 2 Paine, C. C. 11. Articles of agreement were entered into between three bothers, which recited that they had previously agreed to be equal sharers and partners in the product of their own labor and those under their care, and to bear equally the expense of carrying on a farm, raising stock, purchasing land, negroes and other property, whether jointly or individually. The articles then provided for the continuance of the partnership, and extended it to all business in which either of them might engage, and stipulated that if either of the brothers died before a final adjustment and division of the property owned by them jointly or individually, the survivor or survivors (if one, or two of them died before such adjustment and division) should heir or inherit all the property, after a liquidation and final settlement of the debts or lawful claims against all or either of them: *Held*, that under this agreement, lands purchased upon joint account, or in the name of the brothers individually, inured to the benefit of the partnership; that if one of the partners purchased lands in his own name, and sold them, taking a note to himself for the purchase money, such note vested in the partnership, at least in equity, and upon the death of the payee, the surviving partners might file a bill in their own names for the enforcement of the equitable lien against the lands. Houston *v.* Stanton, 11 Ala. 413.

(*e*) Dig. xvii, tit. 2 (*pro socio*), 1, 5 pr.

loss, or the profits, of one particular transaction or adventure, they become partners as to that transaction or *adventure, but not as to anything else. (*f*) *56 For example, if two solicitors, who in some are not partners, are jointly retained to conduct litigation particular case, and they agree to share the profits accruing therefrom, they become partners so far as the business connected with that particular case is concerned, but no further. (*g*) So a partnership may be limited to the working of some particular patent (*h*), or to the working of it in some particular place or district. (*i*) in all such cases as these, the rights and liabilities of the partners are governed by the same principles as those which apply to ordinary partnerships (*k*); but such rights and liabilities are necessarily less extensive than those of persons who have entered into less limited contracts. The extent to which persons can be considered as partners depends entirely on the agreement into which they have entered and upon their conduct.[1]

Partnership in one particular transaction only.

(*f*) See De Berkom *v.* Smith, 1 Esp. 29; Heyhoe *v.* Burge, 9 C. B. 431; Smith *v.* Watson, 2 B. & C. 401; see as to partnerships in profits only, *ante*, pp. 20, 21.

(*g*) Robinson *v.* Anderson, 20 Beav. 98, and 7 De G. Mac. & G. 239; M'Gregor *v.* Bainbridge. 7 Ha. 164.

(*h*) As in Lovell *v.* Hicks, 2 Y. & C. Ex. 481.

(*i*) As in Ridgway *v.* Philip, 1 Cr. M. & R. 415.

(*k*) See Reid *v.* Hollinshead, 4 B. & Cr. 867, and the cases cited in notes (*f*) and. (*g*)

[1] A partnership may exist in a single as well as in a series of transactions. If there is a joint purchase, with a view to a joint sale and a communion of profit and loss, this will constitute a partnership. *In re* Warren, Daveis, 320.

An agreement by two to buy land jointly, and share the proceeds, constitutes a partnership. Ludlow *v.* Cooper, 4 Ohio St. 1. See, also, Plunkett *v.* Dillon, *ante*, p. 23, note.

Several persons separately purchased goods to be put on board of a ship for a voyage, in the profits and loss of which they were to share in proportion to the value of the goods shipped by each: *Held*, that this was a limited partnership for the purposes of the voyage, and that a person, to whom the share of one of the partners was hypothecated, with the knowledge of the others, to secure a loan to such partner for the purposes of the voyage, had a right to insist that the share so hypothecated should not be sold for the repairs of the ship so long as the interests of those concerned could be protected by any other arrangement. American Ins. Co. *v.* Coster, 3 Paige, 323.

Where defendants are sought to be charged as partners in a single venture only, evidence that they are not general partners, nor connected in business, is irrelevant and inadmissible. Schollenberger *v.* Seldonridge, 49 Pa. St. 83.

A and B enter into a contract with C for a conveyance from him to them of a farm, and that they will pay a part in good, negotiable promissory notes, to be

SECTION V.—OF CLUBS AND SOCIETIES NOT HAVING GAIN FOR THEIR OBJECT.

Societies not having gain for their object.

It follows from the propositions established in the foregoing pages, that no partnership or *quasi*-partnership subsists between persons who do not share either profit or loss, and who do not hold themselves out as partners.

Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members as such liable for each other's acts.[2] It was held in Caldicott *v.* Griffiths (*l*), that the members of "The Midland Counties Guardian Society for *57 the protection of Trade" were not *partners *inter se;* and in Flemyng *v.* Hector (*m*) that the members of the "Westminster Reform Club" were not partners as against third persons. (*n*) It is a mere abuse of words to call such associations partnerships (*o*): and if liabilities are to be fastened on any of their members it must be by reason of the acts of those members themselves (*p*)[1], or by reason of the acts of their agents; and the agency

indorsed by them: *Held*, not to constitute them special partners, so that one can bind both by an indorsement in the name of both, without the knowledge and assent of the other. Ballou *v.* Spencer, 4 Cow. 163. See, also, as to special partnerships, Ensign *v.* Wands, 1 John. Cas. 171; Livingston *v.* Roosevelt, 4 John. 270; Post v. Kimberly, 9 Id. 470; Mumford *v.* Nicoll, 20 Id. 611; Reynolds *v.* Cleveland, 4 Cow. 282; Campston *v.* McNair, 1 Wend. 457; Bentley *v.* White, 3 B. Mon. 263; Mifflin *v.* Smith, 17 S. & R. 165; Petripin *v.* Collier, 1 Pa. St. 247; Benson *v.* McBee, 2 McMull., 91; Solomon *v.* Solomon, 2 Kelly, 18; Ripley *v.* Colby, 23 N. H. 438.

[2] Richmond *v.* Judy, 6 Mo. App. 465.

(*l*) 8 Ex. 898. See, too, R. *v.* Whitmarsh, 15 Q. B. 600; Bear *v.* Bromley, 18 ib. 271, as to their not requiring registration under the repealed act, 7 & 8 Vict. c. 110.

(*m*) 2 M. & W. 172.

(*n*) See, too, Todd *v.* Emly, 8 M. & W. 505; The St. Jame's Club, 2 De G. Mac. & G. 383.

(*o*) See *ante*, p. 2. In Lloyd *v.* Loaring, 6 Ves. 773, the Caledonian Lodge of Freemasons, and in Silver *v.* Barnes, 6 Bing. N. C. 180, and Beaumont *v.* Meredith, 3 V. & B. 180, friendly societies were called partnerships; and a benefit building society, 4 Drew. 154, and a loan society, 1 Sim. N. S. 165, have been held to be within the winding-up acts.

(*p*) As in Cross *v.* Williams, 7 H. & N. 675, where the commandant of a rifle corps was held liable for all uniforms he had ordered; see, also, Minnitt *v.* Lord Talbot, L. R. Ir. 1 C. D. 143, where persons who had advanced money to add to and improve a club, were held to have a lien on the property for their money.

[1] See Ewell's Evans on Agency, 30, 31, 308, notes.

The agent is personally liable where there is no responsible princ'p l. 2 Kent's Com. 630; Blakely *v.* Bennecke,

must be made out by the person who relies on it, for none is implied by the mere fact of association. (*q*)

Societies in which each member acts for himself only.

Upon the ground that there is neither community, of profit nor community of loss, it has been held that no partnership subsists between the members of a mutual insurance society, in which each, in consideration of a payment made to him, underwrites a policy for a stipulated sum. A policy so underwritten is neither more nor less than a number of separate contracts, whereby each underwriter agrees, on a given event, to pay the whole or a proportionate part of the sum written against his name. In such a society there is no joint stock; the members of it enter into no joint contract; but each is alone liable for any loss which may happen to the insured, according to the terms of the contract into which each for himself has entered. (*r*)

59 Mo. 193, where the action was upon an instrument signed by a person as captain of a military company; Eichbaum *v.* Irons, 6 W. & S. 67, where it was held that the members of a committee, appointed by a public political meeting to provide a free dinner for the party, are personally liable for the bill.

Pecuniary liability can be fastened upon individual members of an association, organized for purposes other than trade or profit, only by reason of their acts or the acts of their agents; and agency is not implied from the mere fact of association, but must be proved. A course of dealing may amount to proof of original authority. Richmond *v.* Judy, 6 Mo. App. 465.

Individual members of such a club are liable for work done with their concurrence or subsequent approval, where the credit was given to members of the club. Richmond *v.* Judy, 6 Mo. App. 465.

In order to hold a member of an unincorporated religious society responsible for its debts, it must be shown that such member, in some way sanctioned or acquiesced in their creation. Devoss *v.* Gray, 22 Ohio St. 159. See, also, Ridgely *v.* Dobson, 3 W. & S. 118; Sproat *v.* Porter, 9 Mass. 300.

Where certain persons organized as a club, expressly authorized their presiding officer to execute a note in the name of the club, and for its use, and the note is executed and used, those who thus authorized the use of the club name became partners as to this particular transaction, and are each liable to the payee under the common name assumed by them. Ferris *v.* Thaw, 5 Mo. App. 279.

(*q*) Compare Flemyng *v.* Hector, 2 M. & W. 172, and Wood *v.* Finch, 2 Fos. & Fin. 447, where the agency was not established, with Luckombe *v.* Ashton, 2 Fos. & Fin. 705; Cockerell *v.* Aucompte, 2 C. B. N. S. 440; Burls *v.* Smith, 7 Bing. 705; and Delauney *v.* Strickland, 2 Stark. 416, where the agency was established. In Luckombe *v.* Ashton, and Burls *v.* Smith, the defendant was a member of the managing committee. This was not the case in Cockerell *v.* Aucompte, or Delauney *v.* Strickland.

(*r*) See Strong *v.* Harvey, 3 Bing. 304; Redway *v.* Sweeting, L. R. 2 Ex. 400; Gray *v.* Pearson, L. R. 5 C. P. 568; Andrews' & Alexander's case, 8 Eq. 176; and as to suits between the members of such societies, Bromley *v.*

*58 *With respect to industrial and provident societies, see 39 & 40 Vict. c. 45, and a note in the appendix to the present treatise.

SECTION VI.—OF CO-OWNERSHIP.

Co-owners not co-partners.

No partnership necessarily subsists amongst persons to whom property descends, or is given jointly or in common; and even if several persons agree to buy property, to hold jointly or in common, although by the purchase they become co-owners (*s*), they do not become partners unless that also was their intention. (*t*)[1]

Williams, 32 Beav. 177; Harvey *v.* Beckwith, 4 N. R. 90 and 298; and 12 W. R. 819 and 896.

(*s*) As to whether joint purchasers become tenants in common, or joint tenants, see Lake *v.* Gibson, 1 Eq. Ca. Ab. 290; Aveling *v.* Knipe, 19 Ves. 441; Crossfield *v.* Such, 8 Ex. 825; Harris *v.* Fergusson, 16 Sim. 308; Robinson *v.* Preston, 4 K. & J. 505; Bone *v.* Pollard, 24 Beav. 283; Harrison *v.* Barton, 1 J. & H. 287, in which the admissibility of parol evidence on the point was much discussed. In French *v.* Styring, 2 C. B. N. S. 357, *ante*, p. 25, the race-horse was clearly held in common, the owners having become such at different times and by different titles.

(*t*) See Kay *v.* Johnston, 21 Beav. 536. Whether they intended to become partners or not may of course be doubtful, as in Sharpe *v.* Cummings, 2 Dowl. & L. 504, where two persons hired a field wherein to graze their cattle. This subject will be adverted to hereafter when treating of partnership property. Pothier has an appendix on the subject at the end of his essay on partnership; but the appendix is omitted from Mr. Tudor's translation of that essay. See further on this subject the last chapter in Story on Partnership.

[1] If the parties, agreeing to buy land and build a mill, subscribe articles, framed for the purpose of regulating their common action in regard to the common property and the prosecution of the work, they do not thereby become partners, unless the articles in terms establish that relation. Pillsbury *v.* Pillsbury, 20 N. H. 90.

Where two joint owners of a horse entered into a written contract, by which one was to keep the horse for a certain time at a certain price, half of which was to be paid by the other: *Held*, that they were not partners, although so calling themselves in the contract, and that an action would lie on the contract by one against the other. Oliver *v.* Gray, 4 Ark. 425.

Where several parties had subscribed for the purpose of building, and, by the terms of the contract, the property was to be owned by them in common in proportion to the amount subscribed by each, and was to be sold only with the approval of a majority: *Held*, that they were not partners, and that the supreme judicial court had no jurisdiction in equity for the adjustment of their affairs. Woodward *v.* Cowing, 41 Me. 9.

A purchase of land by two persons jointly, and the erection of a building

Speaking generally, and excluding all exceptional cases, the principal differences between co-ownership and partnership may be stated as follows:

Co-ownership and co-partnership compared.

1. Co-ownership is not necessarily the result of agreement. Partnership is.[1]

thereon by one of them with the consent of the other, do not make them partners. Sikes *v.* Work, 6 Gray, 433.

The plaintiff purchased of the defendants one-sixth of 66 bales of cotton, for which he paid them in full. The purchase was made in Boston, under an agreement that the cotton should be delivered at New York, and be there sold on account of all the owners, and be divided between them; when the cotton arrived in New York, the defendants, instead of making a sale or division, by mistake, and without the knowledge or consent of the plaintiff, sent it out of the State to their factory, in New Jersey: *Held*, not to make a partnership, *inter esse*, so as to preclude the plaintiff from suing for the eleven bales, or their value, to which he was entitled. Ward *v.* Gaunt, 6 Duer, 257.

The fact that joint purchases were made as an investment merely, each party paying his proportion of the purchase money, is not sufficient to establish the existence of a partnership, as between the parties, where it appears that no agreement to enter into partnership was made. Chisholm *v.* Cowles, 42 Ala. 179.

Where four out of five tenants in common of a paper-mill, for the more convenient management of their business, entered into an agreement that one of their number should be sole manager, foreman, and book-keeper, another should perform general labor in the mill, another should be engineer, and the fourth should "collect stock and market the paper," at fixed compensations to each: *Held*, that this constituted a partnership of those who signed it in the business of making and vending paper, and that a promissory note, given for stock, in the name of the company, by the party appointed to the charge of that department, was binding on all the parties to the agreement. Doak *v.* Swan, 8 Me. 170.

The purchase of a threshing machine by two parties, to be used by them in common, in payment for which they execute to the vendor their joint note, renders them joint owners; not partners. Iliff *v.* Brazill, 27 Iowa, 131.

[1] Partnership and community are not to be confounded. The first is based on the contract of the parties, which thus creates the community; the last may exist independently of any contract whatsoever. Pickerell *v.* Fisk, 11 La. Ann. 277.

The defendants were patrons of a cheese factory, owned by F. under an arrangement by which each one was to take the milk from his cows to the factory, so long and in such quantities as he pleased, and could have as much of the cheese that was manufactured at the factory as his milk made, paying F. one cent per pound for making the cheese; or he could have his cheese sold with other cheese that was made at the factory, and receive the proceeds. The milk that each person took to the factory was credited to him, each having an interest in the cheese made, in proportion to the quantity of milk he furnished. The cheese was not divided, but was sold from time to time for the patrons: *Held*, that the defendants were not partners, but were tenants in common of the cheese. But when all the defendants consented that a com-

2. Co-ownership does not necessarily involve community of profit or of loss. Partnership does.[3]

3. One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position as regards the other owners as the transferor himself was before the transfer. A partner cannot do this.

4. One co-owner is not as such the agent real or implied of the others. A partner is.[4]

mittee of three, appointed for that purpose, should sell the whole of the cheese belonging to all, they became jointly liable to perform any valid contract their committee made for the sale of the cheese. Hawley *v.* Keeler, 62 Barb. 231. See, also, Sargeant *v.* Downey, 45 Wis. 498, *ante*, p. 19, note.

[3] A mere community of interest will not constitute a partnership; there must also be an agreement to share in profit and loss. Therefore, where one owns an interest in a certain patent, to develop which certain work was performed, that fact does not necessarily of itself make him a partner with the other owner, and liable solely as partner for the work. Boeklen *v.* Hardenburgh, 37 N. Y. Superior Ct. 110.

An association between two persons, one of whom has invented a method of clarifying sugars, to obtain a patent for it in their joint names, and sell its use for a certain sum on each box of sugar clarified, of which each is to have a percentage, does not make them commercial partners. Hermans *v.* Duvigneaud, 10 La. Ann. 114.

Parties who enter into an agreement by which one is bound to contribute land and stock for its cultivation, and the other to contribute personal skill, and labor, and other stock, each to furnish a specified portion of the food for the animals, to pay equally the expenses of the plantation, and to divide equally the crops, are partners, and not tenants in common. Autrey *v.* Frieze, 59 Ala. 587.

Where one of the partners in a company, formed for the purpose of buying and selling lands on speculation, after the company has ceased active operations, transfers to a stranger one-half of the net profits of his share in the company; the residue of his interest, together with the entire control and direction of his share, having been previously assigned to one of his co-partners, in consideration of moneys advanced to him on account of it,—this creates between the two assignees not a partnership but a tenancy in common in the share of their assignor; nor does it constitute the second assignee a partner in the company. Cowles *v.* Garrett, 30 Ala. 341.

The agreement of one joint owner of a plantation with the other, to receive a fixed compensation per annum for his interest, is not a partnership, but merely a lease of the joint interest. McIlvaine *v.* Armfield, 5 La. Ann. 302.

[4] If two persons buy a horse, each paying one-half of the purchase money, under an agreement that either of them having possession of the horse, shall provide for his keeping, without cost to the other, and that each shall offer the horse for sale, and endeavor to procure a purchaser at a profit over his cost; but that neither shall sell the horse without the concurrence of the other; they are tenants in common of the horse, and not partners; and if a person who is neither an innkeeper nor a livery-stable keeper, with whom the horse has been placed by one part-owner, sells the horse by authority

*5. One co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt. A partner has.[1] *59

6. One co-owner of land is entitled to have it divided between himself and co-owners, but not (except by virtue of a recent statute) to have it sold against their consent. A partner has no right to partition in specie, but is entitled, on a dissolution, to have the partnership property, whether land or not, sold, and the proceeds divided.[2]

of the latter, and without the knowledge or consent of the other owner, retaining out of the proceeds of the sale the cost of keeping the horse, paying the balance to the owner who authorized the sale, and not accounting to the other owner, and with no reservation of his half interest in the horse, it is a conversion of the latter's interest, for which an action will lie against both wrongdoers. Goell *v.* Morse, 126 Mass. 480.

A declaration based upon an assignment of *choses in action*, alleged to have been made by certain specified persons, as co-owners, does not support a claim of title based on a finding that the assignment was made by one of them in the name of a firm, composed of both, after the other had withdrawn from the partnership. Seeley *v.* Albrecht, 41 Mich. 525.

[1] S. and W. were owners in common, of land; S. sues W. to recover one-half the cost of improvements made and taxes paid by S. during W.'s absence: *Held*, that from the relation of S. and W., in the absence of any express agreement, the law implied certain mutual rights and duties. Of these, the most prominent are, the right of partition, when either desires it; the right of mutual participation of the fruits and revenues, and the consequent duty to account to each other therefor; the duty of the co-proprietor, who is present, and in actual possession, to take the same care of the property as if it were wholly his own; the right of incurring expenses necessary for the preservation of the common property, and consequent obligations of re-imbursing one another for such outlays. If one of the proprietors make some change in the property, in the other's absence, not necessary for its preservation, which occasions the co-proprietor a loss, or which he has just cause not to approve of, the former does so at his own risk and under the obligations of an equitable restoration. It is not indeed a partnership, but it is controlled in some respects by analogous rules. Smith *v.* Wilson, 10 La. An. 257.

[2] Prior to April, 1870, plaintiffs and defendants were part owners of a newspaper, including the proprietary interest and good will therein, as well as presses, engines, boilers, shafting, type, and all appurtenances used in printing and publishing it. Plaintiffs and C. were its sole conductors, editors, and business managers.

In April, 1870, plaintiffs, defendants, and C. made a written agreement, by which the plaintiffs and C. were to have as compensation for their services to be rendered, 60 per cent. of the profits. The remaining 40 per cent. of profits were to be divided between the proprietors or part-owners, viz: the plaintiffs and defendants herein. This agreement was to continue five years, and specially preserved the title to the property in the proprietors as *tenants in common*.

7. As between the real and personal representatives of a deceased co-owner of freehold land, the equitable as well as the legal interest in his share is real estate; whilst as between the real and personal representatives of a deceased partner, the equitable interest in his share of partnership freehold property is treated as personal estate, although the legal interest in it is real estate.

8. Co-ownership not necessarily existing for the sake of gain, and partnership existing for no other purpose, the remedies by way of account and otherwise which one co-owner has against the others, are in many important respects different from, and less extensive than, those which one partner has against his co-partners. (*u*)[s]

At the end of five years, no other written agreement was made, but plaintiffs, without C., were to continue to conduct the paper as before, excepting that instead of receiving 60 per cent. of the profits for services, plaintiffs were to get a reasonable compensation.

A difference arose as to what was a reasonable compensation. Plaintiffs insisted that as a result of the dealings of the parties, and the written agreement, a partnership existed between them, and that a dissolution of it had occurred, or should be adjudged, an accounting taken, the firm property sold, etc.

The main contest was as to what was the firm property: *Held*, that as the parties were owners in common of the property above named before the agreement was made;—as the agreement specially preserves their title as such through the time that the business as to which they were partners lasted ;—and as the mere use of such property owned in common by them for the business did not make it partnership property, (because there was a special agreement that it should be held in common, and because plaintiffs used it as agents and not as partners) plaintiffs have no right to a judgment that this property be sold in winding up the partnership business: *Held*, that the good-will that might be deemed attached to the operations of the partnership through the five years under the written agreement and since, must be considered as accessory to and an accretion of the good-will and business that existed in April, 1870, and which was owned in common: *Held*, that as to the business of publication of the paper from April, 1870, to the present, plaintiffs and defendants were partners, and plaintiffs are entitled to a judgment for a dissolution and accounting,—the judgment to contain a proper adjudication that the property in existence in April, 1870, is not partnership property. Excluding this property, there will be no difficulty in ascertaining what is partnership property: *Held*, that plaintiffs are entitled to a reasonable compensation for their services since April, 1875. Auten *v.* Ellingwood, 51 How. Pr. 359.

[s] Joint purchasers, without an agreement of partnership, are not entitled to the remedies, nor subject to the responsibilities, of partners. Brady *v.* Calhoun. 1 Pa. 140.

An agreement to divide the income of a business, does not constitute a partnership; nor does mere joint ownership

(*u*) See *infra*, as to this.

When, however, co-owners of property employ it with a view to profit, and divide the profit obtained by its employment the difference if any between them and partners becomes very obscure. The point to be determined is whether from all the circumstances of the case, an agreement for a partnership ought to be inferred; but this is often an extremely difficult question.

Co-owners sharing profits.

If each owner does nothing more than take his share of the gross returns obtained by the use of the common property, partnership is not the result. On the other hand if the owners convert those returns into money, bring that money into a common stock, defray out of it the expenses of obtaining the returns, and then divide the net profits, partnership is created in the profits if not also in the property which yields them. Many perplexing cases may be imagined intermediate between those here put as examples, but the following illustrations will, *it is hoped, enable the reader to appreciate the distinction in question. *60

If several persons jointly purchase goods for re-sale, with a view to divide the profits arising from the transaction, a partnership is thereby created. (x) But persons who join in the purchase of goods, not for the purpose of selling them again and dividing the profits, but for the purpose of dividing the goods themselves, are not partners and are not liable to third parties as if they were. Coope v. Eyre (y) is a leading case in support of this proposition. There an agreement was come to that one person should purchase oil and then divide it amongst himself and others, they paying him their proportion of the price. The oil was bought accordingly, and the purchaser becoming bankrupt, the seller sought to make the other parties to the agreement pay for the oil. But it was held that the purchaser

Joint purchasers of goods for re-sale.

Coope v. Eyre.

inpersonal property. So where a circus property was transferred to two parties (the plaintiff and defendant herein) to secure an indebtedness for money advanced severally by them, and it was agreed that one of them (the defendant) should take possession of the property and transport it from place to place upon a performing tour, and to apply the receipts, first to the payment of the money advanced by the other (the plaintiff), and then to the payment of himself; the receipts came to defendant's hands not as a partner, but as a trustee; and the plaintiff had a right to compel the defendant to account for so much as came to his hands for the purpose of discharging his trust. Quackenbush v. Sawyer, 5 Pacific Coast L. J. 277.

(x) Reid v. Hollinshead, 4 B. & C. 867.

(y) 1 H. Blacks. 37.

purchased as a principal and not as an agent, and that as there was no community of profit or loss, the persons amongst whom the oil was to be divided could not be made liable as partners or *quasi*-partners. In Hoare *v.* Dawes (*z*) there was a similar agreement, and Lord Mansfield thought at first that there was a *quasi*-partnership, but he and Willes, Ashhurst and Buller, J. J., ultimately decided that there was not, there being no agreement to share profit or loss, and there being no pretense for holding the purchasers liable for the acts of each other by reason of their holding themselves out as partners.

Hoare v. Dawes.

So in Gibson *v.* Lupton (*a*), two persons joined in the purchase of some wheat with the intention of dividing and paying for it equally, and it was held that as there was no joint interest in profit or loss they could not be considered partners, either as between themselves or as regarded third parties.

Gibson v. Lupton.

Moreover, part-owners who divide what is obtained by the use or employment of the thing owned, are not thereby constituted partners. For example, if two tenants in common of a house let it and divide the rent equally amongst them, they are not partners, although they may pay *61 for repairs out of the *rent before dividing it. (*b*)[1] So two persons who are tenants in common of a race-horse, and share his winnings on the one hand, and the expenses of his keep on the

Part-owners sharing the produce of their property.

(*z*) 1 Doug. 371.

(*a*) 9 Bing. 297.

(*b*) See *per* Willes, J., in the case cited in the next note. See, also, Lyon *v.* Knowles, 9 B. & Sm. 556, where the gross receipts of a theatre were divided.

[1] A person cannot be charged as a co-partner in business carried on at a mill, for the price of a steam engine and machinery erected in the mill, under a written contract with another person admitted to be a co-partner, by proof of his being owner as tenant in common of the mill with those admitted to be co-partners; and of his having said that the engine was satisfactory, and that when the mill was built he was a partner in the concern, but had since sold out to the others. Thurston *v.* Horton, 16 Gray, 274.

Upon the question, whether one of the defendants was a partner in a certain firm, it appeared that he was a tenant in common, of certain real estate in Bethlehem, and went there and transacted some business. He contended that any acts and sayings of his, applicable to his relation as tenant, and explicable by it, were not sufficient to prove him a partner, even though, in the absence of the tenancy in common, they might tend to prove the partnership, the burden of proof being on the plaintiff. The court instructed the jury that his taking part in the management of the land, and cutting down and disposing of the timber, with the other tenants in common, did not necessarily make him a partner with them; that they were to weigh and consider the evidence derived from his

other, are not partners, but co-owners only. (*c*) So part-owners of ships are not usually partners (*d*), although they may be partners as well as part-owners, as was the case in Campbell *v.* Mullett. (*e*)

So again with respect to mines and quarries. Tenants in common or joint tenants of a mine or quarry may or may not be partners; and the mine or quarry itself may or may not be part of a common stock. But it is highly inconvenient, if not altogether impossible, for co-owners of a mine or quarry to work it themselves without becoming partners, at least in the profits of the mine; and persons who work a mine or quarry in common are regarded rather as partners in trade than as mere tenants in common of land. (*f*) Co-owners of mines.

Three cases have here to be considered:

1. The co-owners may be partners not only in the profits but also in the mine itself. The co-owners are then partners to all intents and purposes, and their mutual rights and obligations are determined by the law of partnership as distinguished from the law of co-ownership. (*g*) Co-owners partners in profits and in mine.

2. The co-owners may not be partners at all; neither in the profits nor in the mine. Their mutual rights and obligations are then determined by the law of co-ownership as distinguished from the law of partnership. In this case each owner is entitled to an account of what the others have got Co-owners not partners at all.

acts and declarations, and if, upon a view of the whole case, they thought it more probable that whatever he did and said, referred solely to his interest as a tenant in common, and not to his interest as a partner, they should return that verdict for the defendant. But, if they believed it more probable that his acts and sayings proved him to be a partner, and did not refer solely to his interest as a tenant in common, they should find for the plaintiff: *Held*, that the instructions were correct. Chase *v.* Stevens, 19 N. H. 464.

(*c*) French *v.* Styring, 2 C. B. N. S. 357; *quære*, whether there was in this case a partnership in the *profits*? It would seem not; the agreement being to divide the winnings as gross returns. See *ante*, page 25.

(*d*) Helme *v.* Smith, 7 Bing. 709; *Ex parte* Young, 2 V. & B. 242; *Ex parte* Harrison, 2 Rose, 76; Green *v.* Briggs, 6 Hare, 395.

(*e*) 2 Swanst. 551. See ib. p. 575.

(*f*) See Jefferys *v.* Smith, 1 Jac. & W. 298; Crawshay *v.* Maule, 1 Swanst. 495; Fereday *v.* Wightwick, 1 R. & M. 45.

(*g*) There is no authority for saying that in this case one of the partners can, in the absence of special agreement or custom, assign his share without the consent of the other partners. That in this case the right is to a sale, and not a partition of the mine. See Wilde *v.* Milne, 26 Beav. 504; Crawshay *v.* Maule, 1 Swanst. 495; Lees *v.* Jones, 3 Jur. N. S. 954.

*62 from the *mine more than their share (*h*); and to transfer his share in the mine without the consent of the other owners (*i*); and to have a partition made of the mine between him and them. But the writer conceives that in the case now supposed no owner is entitled to have the mine sold against the consent of the others. (*k*) Whether, if the co-owners cannot agree as to the mode of working the mine, an action will lie for the appointment of a receiver and manager, is not settled. Lord Eldon in Jefferys *v.* Smith (*l*), is generally understood to have intimated that it will; but the case before him was not of the description now under discussion, being one in which the mines were worked in partnership; and in a recent and carefully considered case the contrary rule was treated as more correct. (*m*)

3. The co-owners of a mine may work it together, bring the pro-
Co-owners partners in profits only. duce into a common fund, and be partners in the profits of the mine but not in the mine itself. In this case the mutual rights and obligations of the owners are determined partly by the law of partnership and partly by the law of co-ownership, and some curious anomalies are the consequence. The most important of these are as follows:

1. Each co-owner may transfer his interest in the mine and in the partnership working it, without the consent of the other owners. (*n*)

2. Each co-owner is entitled to maintain an action for an account against the others without seeking for a dissolution of the partnership. (*o*)

*63 *3. Upon a dissolution of the partnership, the mine itself, not being partnership property, must be divided between its

(*h*) Denys *v.* Schuckburgh, 4 Y. & C. Ex. 42.

(*i*) Bentley *v.* Bates, 4 Y. & C. Ex. 182.

(*k*) *i. e.*, except under the Act 31 & 32 Vict. c. 40, enabling a sale to be made in lieu of partition. See Steward *v.* Blakeway, 4 Ch. 603, and 6 Eq. 479.

(*l*) 1 J. & W. 302. Wynget *v.* Heathcote, cited in 4 Y. & C. Ex. 187, supports the same view, but the circumstances of the case are not sufficiently known.

(*m*) Roberts *v.* Eberhardt, Kay, 148. Where the mine has been worked in partnership, and the partnership has been dissolved, and the mine ordered to be sold, an interim receiver and manager will, if necessary, be appointed. Lees *v.* Jones, 3 Jur. N. S. 954.

(*n*) Bentley *v.* Bates, 4 Y. & C. Ex. 182; Crawshay *v.* Maule, 1 Swanst. 517-9.

(*o*) Bentley *v.* Bates, 4 Y. & C. Ex. 182.

several owners and not be sold: (*p*) unless under the statute enabling sales to be made in lieu of partition. (*q*)

4. As between the real and personal representatives of a deceased partner, his share of the mine will be real and not personal estate. (*r*)

5. With a view to a dissolution the Court will, if necessary, appoint a receiver and manager to carry on the mine for the benefit of all parties interested. (*s*)

6. The obligation of each co-owner to account to the others, is the same as that of one partner to account to his co-partners, and much more extensive therefore than the obligation which exists in a case of mere co-ownership. The lien which each partner has on the shares of his co-partners for what is due from them to the partnership extends to cases of this 3rd class (*t*); as does also the obligation which one partner is under to account to his co-partners for benefits he may have received in respect of the common property. It has been decided that where two tenants in common of a mine construct a shaft at their own expense in land belonging to one of them exclusively, money paid by a stranger for the use of that shaft belongs to both tenants, and not exclusively to him in whose land the shaft is constructed. (*u*)

Note on the remedies available by one co-owner against the others.

In order still further to understand the differences between co-ownership and co-partnership it is necessary to compare the rights and remedies of *co- *64
owners against each other with the corresponding rights and remedies of partners. The rights and remedies of partners *inter se*, will be fully investigated hereafter; but as there is no compendious summary of the rights and remedies of co-owners *inter se*, the following note is here appended.

The obligation of a partner to account with his co-partner arises *ex contractu*, and this obligation is not confined to the partners themselves, but devolves, with

(*p*) Steward *v.* Blakeway, 4 Ch. 603, and 6 Eq. 479. A sale was decreed in the cases referred to, *ante*, note (*g*), but in them the mine was a partnership asset. Consider the analogous case of a ship.

(*q*) 31 & 32 Vict. c. 40.

(*r*) Steward *v.* Blakeway, *ubi sup.*

(*s*) Roberts *v.* Eberhardt, Kay, 148; Lees *v.* Jones, 3 Jur. N. S. 954; Jefferys *v.* Smith, 1 J. & W. 302; Rowe *v.* Wood, 2 ib. 553; Wynget *v.* Heathcote, cited 4 Y. & C. Ex. 187. Whether a receiver and manager will be appointed if no dissolution is sought, see the judgment in Roberts *v.* Eberhardt.

(*t*) Fereday *v.* Wightwick, 1 R. & M. 45; Roberts *v.* Eberhardt, Kay 148; Crawshay *v.* Maule, 1 Swanst. 495.

(*u*) Clegg *v.* Clegg, 3 Giff. 322.

its correlative right, upon their respective representatives. The obligation of one co-owner to account with the other for the profits which may have arisen from the common property cannot be based upon contract where no contract has been entered into; but it by no means follows, that because there is no contract, express or tacit, to share profits, each co-owner ought to be entitled to get what he can and to keep what he may get. This was seen plainly enough by the Roman lawyers, who properly held an obligation to arise *quasi ex contractu*, and who found no difficulty in declaring that every co-owner ought to account to the others for the profits received by himself, and to contribute with them to the expenses properly incurred for the common benefit. (*x*) Our ancestors, however, seem to have taken a different view of the matter.

By the strict rule of the common law, one co-owner of land was entitled to no account from another unless the former had made the latter his bailiff, or had been actually ousted from the land (*y*) [1]; and one co-owner of a chattel had no remedy against another, unless he had destroyed the common property. (*z*) The statute 4 Anne, c. 16, § 27, has placed co-owners of land in a somewhat better position than they were in before, by enacting that an action of account may be maintained by one co-owner against another for receiving more than his share; but nothing has been done to improve the law as to co-owners of chattels except by the introduction by Equity Judges of rules founded on the principles of the Roman law.[2]

The inadequacy of the remedies available by one co-owner against another at common law is justified by early writers upon the ground that each tenant in common has it in his own power to enter on the common property, if it be land, and to get possession of the common property, and retain it, if it be an ordinary chattel; and according to the writers in question, it is only when one co-owner prevents the other from entering in the first case, and, by destroying the chattel, from getting possession of it in the other, that there is any necessity for having recourse to an action. (*a*) The unsatisfactory nature of this reasoning is too apparent to require comment; for admitting its force in the case of land, it is plainly in the highest degree unjust to allow one co-owner of a valuable chattel to keep it exclusively in his own possession, and to tell the other that his only remedy is to take it peaceably when he sees his time, and having got it to be careful not to part with it.

*65 Unsatisfactory, however, as the *reasoning is, it affords the only explanation of the actual state of the law upon the subject under consideration.

In order to understand accurately the remedies, which by the law of this country are available for one co-owner against another, it is necessary, in the first place, to distinguish land from chattels.

(*x*) See Inst. lib. 3, tit. 27, §§ 3–5; and Dig. lib. x. tit. 2, l. 25, § 16, and tit. 3, l. 4, § 3, and lib. xvii. tit. 2, l. 34.

(*y*) See Co. Lit. 200.

(*z*) *Ibid.*

(*a*) See Lit. § 323.

[1] As to wrongs to real property by one tenant in common, see Cooley on Torts, 327.

[2] As to conversion by one tenant in common, see Cooley on Torts, 455.

1. *With respect to land.*

Co-owners of land.

1. If land is owned by several persons, jointly or in common, each is entitled to enter upon and occupy it. (*b*)

2. If any one of them is actually excluded by the others he can bring an action for his undivided share (*c*); and having recovered can sue for mense profits (*d*); and in an action for them the jury are not bound to confine the damages to the value of the actual profits made by the defendant, (*e*) In case of actual exclusion or destruction an action will also lie by one co-owner against the other (*f*)[1]; and a receiver can be obtained. (*g*)

3. Subject to the provisions of the act of 31 & 32 Vict. c. 40, one co-owner of land is entitled to have it divided between himself and the other owners, although they may not desire a partition. (*h*)

4. If one co-owner makes the other his bailiff or receiver, the latter can be compelled to account, not only for what he has received, but also for what he might have received without his own willful default. (*i*)

5. And by the statute of Anne (4 Anne, c. 19, § 27) one co-owner who receives more than his share can be made to account to the other owners for what he has received more than he ought. (*k*)

6. But it has been decided, since the passing of this statute, that one co-owner of land, who merely occupies the whole, is not liable to pay any rent to the other owners. (*l*)

7. And it has also been decided that if one co-owner not only occupies *the whole land, but expends his own industry and capital upon it, and thereby realizes profit (*e. g.* by farming), he is not liable to account to his co-owners for any share of such profit. (*m*) *66

8. But if one co-owner of land derives gain, not from the mere use of the land

(*b*) Lit. § 323. One is not entitled to a receiver as against the others if they do not exclude him, Sanford *v.* Ballard, 30 Beav. 109. See *infra*, note (*g*).

(*c*) Litt. §§ 322 and 323, and Coke's Com. upon them. As to evidence of actual exclusion, see Doe *v.* Prosser, Cowp. 217; Jacobs *v.* Seward, L. R. 5 H. L. 464.

(*d*) Goodtitle *v.* Tombs, 3 Wils. 118.

(*e*) Ibid.

(*f*) Cresswell *v.* Hedges, 1 H. & C. 421, where the defendant paid money money into court in respect of the damage to the plaintiff's share.

[1] See generally, Cooley on Torts, 327.

(*g*) Sandford *v.* Ballard, 33 Beav. 401.

(*h*) See Bac. Ab. Joint-tenants, I, 7, and Agar *v.* Fairfax, 17 Ves. 533, and the notes to it in 2 Wh. & Tud. L. C. 407, edit. 3.

(*i*) Co. Lit. 200 *b*, and 172 *a*.

(*k*) The remedy at law was by an action of account and not by an action for money had and received, Thomas *v.* Thomas, 5 Ex. 28; Jacobs *v.* Seward, L. R. 5 H. L. 464.

(*l*) Teasdale *v.* Sanderson, 33 Beav. 534; Wheeler *v.* Horne, Willes, 208; M'Mahon *v.* Burchell, 2 Ph. 127. But see Drury *v.* Drury, 1 Rep. in Ch. 49. In Turner *v.* Morgan, 8 Ves. 145, there was exclusion. Where one of the co-owners is an infant, see Pascoe *v.* Swan, 27 Beav. 508.

(*m*) Henderson *v.* Eason, 17 Q. B. 701, and 2 Ph. 308; Jacobs *v.* Seward, L. R. 5 H. L. 464.

by himself, but by being paid for the use thereof by others, he must account to the other owners for what he receives beyond his own share. (*n*)

9. *A fortiori*, if one co-owner of land derives gain by wasting the common property, he is liable to account to the other owners for their shares of the money so obtained (*o*). He can also be restrained by a co-tenant from committing destructive waste (*p*), but not from cutting timber in a proper and judicious manner; nor, it is conceived, from mining in a similar way. (*q*)

10. If one of several joint tenants, or tenants in common of a house, lays out money in necessary repairs, he is entitled to contribution from the other tenants (*r*); although it seems that he has no lien on the house or their interest therein for their shares of the expense. (*s*)

2. *With respect to chattels.*

Co-owners of chattels.

Ships are by far the most important chattels usually owned in common. But great care is required in applying the rules which govern ships to other chattels; for, in the first place, the principles enforced in the court of admiralty differ in many important respects from those by which the ordinary courts are governed; and, in the next place, the stringent provisions of the ship registry acts have frequently rendered it impossible to apply to ships those general doctrines of equity which are applicable to other kinds of property.[1] For the purpose, therefore, of avoiding error in pursuing the present subject of inquiry, ships must be distinguished from other chattels.

(*n*) Henderson *v.* Eason, 17 Q. B. 701. See, too, Clegg *v.* Clegg, 3 Giff. 322, *ante*, p. 63, note (*u*); Carter *v.* Horne, 1 Eq. Ca. Ab. 17, as to sharing benefits derived by one.

(*o*) Co. Lit. 200 *b*; Martyn *v.* Knowlys, 8 T. R. 145. See the last sentence in the judgment. See, as to injunctions to restrain waste, Twort *v.* Twort, 16 Ves. 128.

(*p*) Arthur *v.* Lamb, 2 Dr. & Sm. 428.

(*q*) *Ibid.*

(*r*) Co. Lit. 200 *b*.

(*s*) See Kay *v.* Johnston, 21 Beav. 536; Teasdale *v.* Sanderson, 33 Beav. 534.

[1] To the point that joint ownership of a vessel in the absence of special agreements, does not create a partnership, see Hopkins *v.* Forsyth, 14 Pa. St. 34; Ward *v.* Bodeman, 1 Mo. App. 272; Holmes *v.* U. S. Ins. Co. 2 John. Cas. 329; Phillips *v.* Purington, 15 Me. 425. See, also, Macy *v.* DeWolf, 3 Woodb. & M. 193.

As to what acts of part owners of a vessel will render them liable to be sued as partners, see Bacon *v.* Cannon, 2 Houst. 47.

The interests of all the joint owners are not barred by a sale on execution against part. Hopkins *v.* Forsyth, 14 Pa. St. 34.

Where a part owner of a steamboat, built by partners, sells the whole of the boat, and delivers possession to the purchaser, a sale by the other owner is the sale of a *chose in action* merely, or a right to sue, which could not be transferred to the vendee; and such vendee will not be protected by a court of equity as an innocent *bonâ fide* purchaser, but the first sale will be confirmed, as more money was obtained by the sale than would have been got under a sale by decree, and the proceeds will be applied to settling up the partnership

A considerable portion of the law which regulates the mutual rights and obligations of part-owners of ships is based upon the assumption that it is particularly for the benefit of the public, that ships should not lie idle (*t*). Hence it is that a majority of the part-owners of a ship can employ her against the will of the others, upon giving them security to the value of their shares (*u*); a course which cannot be taken by a majority of the *part-owners of any other chattel. Where a ship is sent on a voyage by some of the part owners against the will of the others, the dissentients are not entitled to share the profits of the voyage (*x*), nor are they liable to contribute to its losses (*y*). But where a ship is employed by all the part-owners, or by some of them, but not against the will of the others (*z*), they all share her gross earnings, and contribute to the expenses incurred, in obtaining them;[1] and in such a case there is little, if any, difference between the account which is taken between the part-owners, and that which would be taken if they were actually partners. 1. Ships. *67

Before any division of profits amongst the part-owners, the gross freight or earnings of the adventure must be applied in payment of the expenses of the voyage yielding them, including the costs of repairs and outfit for that voyage. (*a*) Lord Hardwicke went further, and held that each part-owner had a lien on the ship itself, and on the proceeds of its sale for the balance due to him from the other owners on the joint account, and had a right to a sale of the ship as if it were partnership property. (*b*) But Lord Eldon thought this was going too far; and he reversed Lord Hardwicke's decision; and it is now settled that there is no such lien or right. (*c*) Lord Eldon's view, however, has not prevailed in America. (*d*)

Passing from ships to other chattels, the position of a part-owner not in possession was at law most disadvantageous; for 1, he could not obtain possession otherwise than by taking the thing itself if he had the chance (*e*); 2, he could not obtain the value of his share unless the thing had been actually or virtually destroyed (*f*); and 3, these rules applied as well to the produce of the thing, as to the thing itself. (*g*) Whether, if one tenant in common of a chattel sold it, the other had any remedy at law for his share of the money 2. Other chattels.

affairs. Hewitt *v.* Sturdevant, 4 B. Mon. 453.

(*t*) See Maclachlan on the Law of Merchant Shipping, 89.

(*u*) *Ibid.* 92.

(*x*) Anon., 2 Ch. Ca. 36; Davis *v.* Johnston, 4 Sim. 539.

(*y*) Horn *v.* Gilpin, 1 Ambl. 255. Davis *v.* Johnston, 4 Sim. 539, is not opposed to this. The marginal note, however, is calculated to mislead.

(*z*) Strelly *v.* Winson, 1 Vern. 296, as corrected by Horn *v.* Gilpin, 1 Amb. 255.

[1] See, however, Macy *v.* De Wolf, 3 Woodb. & M. 193.

(*a*) Green *v.* Briggs, 6 Ha. 395; Lindsay *v.* Gibbs, 22 Beav. 522, and 26 ib. 51, and 3 De G. & J. 690; Alexander *v.* Simms, 18 Beav. 80, and 5 De G. M. & G. 57.

(*b*) Doddington *v.* Hallet, 1 Ves. S. 497, and see A.-G. *v.* Borrodaile, 1 Price, 148, and *per* Lord Eldon, 2 V. & B. 243.

(*c*) *Ex parte* Young, 2 V. & B. 242; *Ex parte* Harrison, 2 Rose, 76.

(*d*) See Story on Part. § 444.

(*e*) Lit. § 323, and see 2 Wms. Saund. 47 *o*.

(*f*) Co. Lit. 200; Jacobs *v.* Seward, L. R. 5 H. L. 464.

(*g*) See Fennings *v.* Grenville, 1 Taunt. 241, where a whale had been converted into blubber and oil.

produced by the sale, was doubtful (*h*)[1], unless the sale had conferred a good title to the entirety upon the purchaser, when a remedy clearly existed. (*i*)

*68 *The obligation of a co-owner of a chattel to account for the gain which he might have derived from its use may therefore be said to have been hardly, if at all, recognized at law. In equity the case was otherwise, but it is surprising how little direct authority there is upon the subject of co-ownership, if the decisions relating to ships and the winding-up of partnerships are excluded from consideration. The principles, however, upon which these decisions are based, may safely be applied to other cases if the anomalies introduced by the ship registry acts, and the fact that the rights of partners and those claiming under them depend upon the contract, are borne in mind.

When the profits derived by one part-owner of a chattel are not attributable to his own industry and exertions, but are simply what he receives from others in respect of it (*e. g.* dividends of stock, or shares, or money paid for hire)—or where the profits are produced in the ordinary course of nature (*e. g.* by breeding)—there is no difficulty in coming to the conclusion that his co-owners are entitled to make him account to them for their shares of what their property may have produced. Further, when one co-owner of a chattel derives gains from its use, and those gains are attributable, mainly, or in part, to his own industry and exertions, justice to the other owners and to him requires, either that the gains made by him shall be shared by all, they making him a proper allowance for his trouble and reimbursing him his expenses; or that he shall be allowed to keep the whole profits, paying the other owners a proper sum for the use of their property. Of these two modes of adjusting the rights of the parties, the first seems to be most in accordance with the course usually adopted in analogous cases. Notwithstanding, therefore, the little direct authority upon the point, the writer ventures to submit that as a general rule where one owner of a chattel derives gain from its use, he is, independently of any contract, bound to account to the other owners for their respective shares, he being allowed all proper charges and expenses. (*k*)

Cases may, nevertheless, arise in which justice may be done by allowing each co-owner to make what he can and to keep what he may get. This may occur where the chattel is such that each co-owner can, in fact, enjoy his rights to the full extent, without the concurrence of the other owners (*e. g.* where the chattel is a patent for an invention). In the case of a patent, belonging to several persons in common, each co-owner can assign his share and sue for an infringement (*l*), and can also work the patent himself, and give licenses to work it; and it is now settled that he is entitled to retain for his own benefit whatever profit he may derive from the working, although it is perhaps

Co-owners of patents and copyrights.

(*h*) See Heath *v.* Hubbard, 4 East. 110; Mayhew *v.* Merrick, 7 C. B. 229; Morgan *v.* Marquis, 9 Ex. 145; Barton *v.* Williams, 5 B. & A. 395, and Williams *v.* Barton, 3 Bing. 139.

[1] See, generally, Cooley on Torts, 455, where the subject will be found fully considered.

(*i*) See Jacobs *v.* Seward, L. R. 5 H. L. 464, and the cases in the last note, and *per* Willes, C. J., in Wheeler *v.* Horn, Willes, 208.

(*k*) See the judgment of V.-C. Wigram, in Green *v.* Briggs, 6 Ha. 395, and Strelley *v.* Winson, 1 Vern. 297. See, also, 1 Story's Eq. Jur. § 466.

(*l*) See Dunnicliffe *v.* Mallett, 7 C. B. 209, and Walter *v.* Lavater, 8 ib. 162. As to tenants in common of trade-marks, see Dent *v.* Turpin, 2 J. & H. 139.

still open to question whether he is not liable to account for what he receives in respect of the licenses. (*m*)[1] The *mutual rights of the co-owners of a copyright, not being partners, have not been decided, but they are probably similar to those of co-owners of patents. (*n*) *69

If part-owners of an ordinary chattel cannot agree who ought to have it, or how it ought to be employed, the only remedy (if any) appears to be by an action for a receiver and a sale.

(*m*) Mathers *v.* Green, 1 Ch. 29, reversing S. C. 34 Beav. 170. The same point was discussed, but not decided in Hancock *v.* Bewley, Johns. 601. See, also, Russell's Patent, 2 De G. & J. 130; Horsley *v.* Knighton's Patent, 8 Eq. 475.

[1] Persons may be joint owners of a patent right, and not be partners in the business of selling interests in the same. Manhattan B. Mf'g Co. *v.* Sears, 1 Sweeny (N. Y.), 426. See, also, Parkhurst *v.* Kinsman, 1 Blatchf. 488.

The mere conveying an undivided interest in a patent, to each of four parties, does not make them partners, yet if they agree to make a common interest to sell, and divide the net proceeds equally, a partnership is created. Penniman *v.* Munson, 26 Vt. 164.

(*n*) See some observations on the indivisibility of copyright in 4 H. L. C. 992.

*70

*CHAPTER II.

OF THE CONSIDERATION OF A CONTRACT OF PARTNERSHIP.

Consideration for a partnership.

AGREEMENTS to share profits, like all other agreements, require to be founded on some consideration in order to be binding. Any contribution in the shape of capital or labor, or any act which may result in liability to third parties, is a sufficient consideration to support such an agreement. (*a*)[1]

(*a*) See The Herkimer, Stewart's Adm. Rep. 23.

[1] The consideration of the contract of partnership in this case consists of the mutual covenants and premises of the co-partners, and the acts they respectively engage to perform. Hence, although the business of the partnership was the buying and selling of slaves, it cannot be said that the consideration of the partnership contract was the purchase of slaves. Belcher *v.* Conner, 1 S. C. 88.

When an agreement to become stockholders in specified shares in a partnership, and to pay the amount subscribed, is signed by a number of persons with the number of shares and the aggregate amount thereof annexed to their names, though no promise is named in the agreement, in effect, each party promises to the others to pay the amount; and the promises of the others are a consideration for the promise of each, and the parties are sufficiently definite. Kimmins *v.* Wilson, 8 W. Va. 584.

When such subscribers organize a company and appoint a treasurer, and, by agreement of the parties, one makes a promissory note, payable to the person appointed treasurer, for his unpaid share, the previous liability and agreement constitute an adequate consideration for the note. Kimmins *v.* Wilson, *supra*.

A contract of partnership between two physicians, F. and S., provided that they should divide equally the gross receipts of their joint business in a certain town; that F. might be absent six months in the year, or for any remaining portion of the year, and S. might be absent when he pleased, but neither, if absent more than two days at a time, should have any part of the income derived from the business of the other during that time; that before either party should withdraw from the contract, any horse or carriage purchased for the joint business should be sold, and the loss sustained by the party withdrawing; that if F. should withdraw and cease to do business in that town, without having shared the benefit of the business at all, then S. should pay him a certain sum: *Held*, that so long as the contract was executory, there was no evidence of any consideration for the

A *bonâ fide* contract of partnership is not invalidated by the unequal value of the contributions of its members, for they must be their own judges of the adequacy of the consideration of the agreement into which they enter.

As observed by Vice-Chancellor Wigram, "If one man has skill, and wants capital to make that skill available, and another has capital and wants skill, and the two agree that the one shall provide capital and the other skill, it is perfectly clear that there is a good consideration for the agreement on both sides, and it is impossible for the Court to measure the quantum of value. The parties must decide that for themselves." (*b*)

It often happens that persons agree that all profits shall be shared rateably, and, nevertheless, that all losses shall be borne by some or one of them exclusively. Such an agreement is not necessarily invalid as a *nudum pactum;* for it is nothing more than an agreement, providing, amongst other things, that some or one of the partners shall indemnify the others against losses; and the very fact that these latter become, or agree to become, partners, is quite sufficient consideration to give validity to a contract that they shall be indemnified. Such agreements appear, moreover, to be highly reasonable, where the *partners indemnified leave the whole management of the *71 concern to their co-partners. (*c*)

Profits to be shared, but losses not.

Of the return of premiums.

It frequently happens, when one person is admitted into partnership with another already established in business, that Premiums.

agreement to pay the sum mentioned, apparent on the face of the contract itself. Frothingham *v.* Seymour, 118 Mass. 489.

A co-partnership agreement in which one of the partners promises to give the other partner an equal interest in the profits of the enterprise, without anything being furnished by the latter to accomplish the object of the co-partnership, is without mutuality and accordingly is void. Mitchell *v.* O'Neale, 4 Nev. 504.

(*b*) Dale *v.* Hamilton, 5 Ha. 393.

(*c*) Geddes *v.* Wallace, 2 Bli. 270, is an instance of such an agreement. However, in Brophy *v.* Holmes, 2 Moll. 1, the L. C. Hart expressed an opinion that an agreement between A & B that A should advance capital, that B should be sole manager, and that they should divide the profits equally, but that all losses should fall on B was, as regards the last stipulation, void, as being *nudum pactum;* and his Lordship thought that under such an agreement the losses should be borne equally. But see, as to such partnerships, *ante*, p. 22, *et seq.*

it is agreed that the incoming partner shall pay the other a premium, *i. e.*, a sum of money for his own private benefit. Such an agreement is valid; and if the premium is not duly paid, it may be recovered by an action, provided the plaintiff has been ready and willing to take the defendant into partnership as agreed. (*d*)

The consideration for the premium is not only the creation of a partnership between the person who takes, and him who parts with, the money, but also the continuance of that partnership; and if a person on his entry into a partnership pays a premium, and then the partnership is determined sooner than was expected, the question arises whether any, and if any, what part of the premium ought to be returned?

In order to determine this point, it is necessary in the first place to ascertain whether the agreement for the premium was or was not tainted with fraud.

Premiums returnable in cases of fraud.

If a person has been deluded into becoming a partner by false and fraudulent representations, and has paid a premium, he may take one of two courses, viz., either abide by the contract, and claim compensation for the loss occasioned by the fraud, which he may do in taking the partnership accounts; or he may disaffirm the contract, and thereby entitle himself to a *72 return of the whole of the money he has paid. (*e*) And *in a case of this sort, in the event of the bankruptcy of the defrauding partner, the amount of the premium paid to him is a debt provable against his estate in competition with his separate creditors. (*f*)

Return of premium where the consideration for it has failed.

But if the agreement by virtue of which the partnership was entered into, and the premium became payable, is not tainted by fraud, then the proper mode of dealing with the premium it not so easy to determine. In the first place, assuming the partnership to have been in fact created, it is clear that there has not been a *total* failure of consideration for the premium; and, consequently, it cannot be recovered as money paid

(*d*) Walker *v.* Harris, 1 Anstr. 245; where it was held that no partnership deed need be tendered.

(*e*) See *infra*, p. 72, *et seq;* and as to rescinding for fraud, *infra*, book iii, c. 10.

(*f*) *Ex parte* Turquand, 2 M. D. & D. 339; and see Bury *v.* Allen, 1 Coll. 589. The case of *Ex parte* Broome, as reported in 1 Rose, 69, is opposed to this, but see on that case the note in 1 Coll. 598, and the observations at the end of the judgment, ib. p. 607.

for a consideration which has failed. (*g*) In the next place, persons who enter into partnership know that it may be determined at any time by death and other accidents; and unless they provide against such contingencies, they may fairly be considered as content to take the chance of their happening. (*h*)

On the other hand, if a person receives a premium for taking another into partnership, which is to endure for a certain time, and then himself does anything which determines the partnership before that time has elapsed, he may be fairly considered as having precluded himself from insisting on his strict right to retain or be paid his whole premium. Moreover, where there has been no misconduct, the tendency has been to regard a premium paid for a partnership for a term of years as apportionable in the event of a premature determination of the partnership by an unforeseen occurrence. The fact that the consideration for the premium has partially failed has been considered sufficient to render it inequitable to retain or obtain payment of the whole premium.

Apportionment of premium when partnership ceases sooner than was expected.

Similar views have been taken with respect to what is right in cases of a similar kind, arising on the death of a solicitor who has been paid a premium by an articled clerk. * In such *73 cases, the premium paid, the time during which instruction was to be given, and the time during which it actually was given, are considered, and a fair apportionment of the premium is then made. (*i*)

The principles applicable to cases of this description are not even yet well settled; nor are the decisions upon them easy to reconcile.

The following rules are, however, submitted to the reader as guides on this subject:

1. Where a partnership is entered into for no specified time, and there is no agreement for a return or an apportionment of the premium in the event of an unexpected determination of the partnership, no part of the premium is returnable on the happening of such event. A case of fraud must be dealt with on its own demerits; and a person taking another into partnership

1. Partnerships at will.

(*g*) See Taylor *v.* Hare, 1 Bos. & Pul. N. R. 260.

(*h*) See Akhurst *v.* Jackson, 1 Swanst. 85; Whincup *v.* Hughes, L. R. 6 C. P. 78.

(*i*) See Hirst *v.* Tolson, 2 Mac. & G. 134; *Ex parte* Bayley, 9 B. & C. 691. These cases have been discussed, and not altogether approved in Whincup *v.* Hughes, L. R. 6 C. P. 78.

for no definite time cannot, as soon as he has received the premium, dissolve the partnership and retain what has been paid as the consideration for it. (*k*) But laying aside fraud, and supposing there to be nothing except a partnership created for no specified time and and determined soon after its creation, it is difficult to hold that it was in fact entered into for a longer time, and that the person who came in, paying a premium, has not got all for which he stipulated. (*l*)

2. Where a partnership is entered into for a specified time, and is determined prematurely, the cause of its determination must be considered.

2. Partnerships for a time.

(*a*). Death is a contingency which all persons entering into partnership know may unexpectedly put an end to it. If, therefore, they do not expressly guard against this risk, they may reasonably be treated as content to incur it; and if death should unexpectedly happen, no return of premium not expressly provided for can, it is apprehended, be demanded. (*m*)

Premature termination. (a) By death.

*74 *But even in this case, if a person knows himself to be in a dangerous state of health, and conceals that fact, and induces another to enter into partnership with him, and to pay him a premium, and shortly afterwards dies, the fraud so practiced will entitle the partner paying the premium to a return of part of it; and he can obtain such return in an action for partnership account; he need not rescind the contract *in toto*. (*n*)

(*b*). Bankruptcy of the partnership as distinguished from the bankruptcy of one of the partners cannot, it is apprehended, be a ground for apportioning a premium; for it is a contingency which every one may fairly be taken as contemplating. (*o*) But the bankruptcy of a partner receiving a premium is a ground for its apportionment if he was embarrassed when the partnership commenced, and this fact was not known to his co-partner; (*p*) but not if it was. (*q*) What the effect would be if he became embarrassed after the commencement of the part-

(b) By bankruptcy.

(*k*) Featherstonhaugh *v.* Turner, 25 Beav. 382. See, also, Hamil *v.* Stokes, Dan. 20, and Burdon *v.* Barkus, 4 De G. F. & J. 42 *per* L. J. Turner.

(*l*) See *per* Lord Eldon in Tattersall *v.* Groote, 2 Bos. & P. 134.

(*m*) See Whincup *v.* Hughes, L. R. 6 C. P. 78.

(*n*) Mackenna *v.* Parkes, 36 L. J. Ch. 366, and 15 W. R. 217.

(*o*) See Akhurst *v.* Jackson, 1 Swanst. 85.

(*p*) Freeland *v.* Stansfeld, 2 Sm. &. G. 479.

(*q*) Akhurst *v.* Jackson, 1 Swanst. 85.

nership has not been decided; but the tendency of the most recent decisions is in favor of an apportionment in such a case. The bankruptcy of the partner paying the premium cannot entitle him or his trustee to a return of any part of it; unless he has been made bankrupt by his co-partner who has received the premium. (*r*)

(*c*). The lunacy of a partner causing a dissolution would probably be considered as a ground for apportioning the pre- (*c*) Lunacy.
mium.

(*d*). Disagreements between the partners resulting in a dissolution have given rise to much difficulty. The strong (*d*) Disagreement.
tendency of modern decisions is to apportion the premium in these cases not only where neither partner is to blame (*s*); but *a fortiori* where the partner receiving the premium has so misconducted himself as to give the partner paying it a right to have the partnership dissolved (*t*); and it matters not that the * latter may himself not be altogether free from blame *75
(*u*); nor is the rule altered by the fact that the partners have agreed to dissolve since the institution of legal proceedings. (*x*)

There may, however, be misconduct on the part of the partner paying the premium so gross as to deprive him of his Misconduct.
right to have any of it returned. (*y*) It might be supposed that any misconduct on the part of a partner which was sufficient to entitle his co-partners to a dissolution *in invitum* would be sufficient to deprive him of his right to have any part of his premium returned to him in the event of a dissolution founded on such misconduct. (*z*) Such a principle is at all events rational and comparatively easy of application. But V. C. Wickens, in Wilson *v.* Johnstone (*a*), held it to be erroneous. He considered that the misconduct must be such as to amount to a complete repudiation

(*r*) As in Hamil *v.* Stokes, Dan. 20, and 4 Price, 161. In this case it is to be observed that the contract of partnership was not rescinded on the ground of fraud.

(*s*) Atwood *v.* Maude, 3 Ch. 369.

(*t*) Bullock *v.* Crockett, 3 Giff. 507.

(*u*) Atwood *v.* Maude, 3 Ch. 369, where the partner paying the premium was plaintiff; Astle *v.* Wright, 23 Beav. 77; Pease *v.* Hewitt, 31 Beav. 22. Compare Airey *v.* Borham, 29 Beav. 620, where nothing was returned.

(*x*) Bury *v.* Allen, 1 Coll. 589; Astle *v.* Wright, 23 Beav. 77; Wilson *v.* Johnstone, 16 Eq. 606. Compare Lee *v.* Page, 7 Jur. N. S. 768.

(*y*) See Wilson *v.* Johnstone, 16 Eq. 606; Airey *v.* Borham, 29. Beav. 620; Atwood *v.* Maude, 3 Ch. 369.

(*z*) See Atwood *v.* Maude, 3 Ch. 369; Airey *v.* Borham, 29 Beav. 620.

(*a*) 16 Eq. 606.

of the contract of partnership. What misconduct amounts to such a repudiation is, however, nowhere defined; and the present state of the authorities is such that no rule can be safely relied on. The whole subject requires re-consideration by the Court of Appeal.

3. There does not appear to be any definite rule for deciding in any particular case the amount which ought to be returned. The time for which the partnership was entered into, and the time for which it has in fact lasted, are the most important matters to be considered; but other circumstances must often be taken into account in order to decide what is fair between the parties. At the same time the rule adopted in the most recent decisions has been to apportion the premium solely with reference to the agreed and actual duration of the partnership. (*b*)

3. Amount to be returned.

(*b*) See Wilson *v.* Johnstone, 16 Eq. 606; Atwood *v.* Maude, 3 Ch. 369; Bury *v.* Allen, 1 Coll. 589; Astle *v.* Wright, 23 Beav. 77; Pease *v.* Hewitt, 31 Beav. 22. Compare Bullock *v.* Crockett, 3 Giff. 507; Freeland *v.* Stansfeld, 1 Sm. & G. 479; Hamil *v.* Stokes, Dan. 20, where this rule was not adhered to.

*CHAPTER III. *76

OF THE PERSONS CAPABLE OF ENTERING INTO PARTNERSHIP.

THE parties to a contract of partnership may be considered with reference to

1. Their number.
2. Their capacity.

SECTION 1.—OF THE NUMBER OF PARTNERS.

Number of partners.

By the common law of this country there is no limit to the number of persons who may be associated together in partnership. (*a*)

Statutes regulating the number of persons who may be partners.

But from time to time various statutes have been passed, declaring that certain partnerships shall be either altogether illegal, or, at all events, deprived of some important rights, or exposed to serious penalties, if their members exceed a prescribed number. Of these statutes the Companies act, 1862, is the only one of present practical importance. This act, by § 4, limits the greatest number of persons who can carry on business as partners otherwise than under its provisions to ten, if the business is that of bankers, and to twenty in other cases. But this enactment does not apply to partnerships formed before the 2d November, 1862, (see § 2) nor to those formed in pursuance of some other act of Parliament, or of letters patent, nor to companies engaged in working mines within and subject to the jurisdiction of the Stannaries.

All the other statutes relating to this subject, except the Banking act of 7 Geo. IV., c. 46, have been repealed (*b*); and

(*a*) As to the supposed illegality of partnerships so large as to be incapable of practically suing and being sued, see *infra*, book i. c. 6.

(*b*) A list of them will be found in the 2nd edit. of this treatise, vol. i, p. 82.

*77 *although that act is still in force, no partnership or company can now be formed under it. That act limited the number of persons who could lawfully carry on business as bankers in partnership and issue notes (except under certain restrictions) to six.

SECTION II.—OF THE CAPACITY OF PARTNERS.

Persons who cannot be partners.

By the law of this country, a valid contract of partnership can be entered into between any persons who are not under the disabilities of minority, coverture, or unsoundness of mind, and are not convicts within the meaning of 33 & 34 Vict. c. 23. As will be seen hereafter, when treating of illegal partnerships, there are certain trades, businesses, and professions, which cannot be lawfully carried on, either solely or in partnership, unless some statutory requisite has been complied with: but now that the disabilities under which spiritual persons formerly lay have been removed (*c*), the writer is not aware that there is any class of persons (except convicts), who, being of sound mind, over twenty-one, and, if women, unmarried, are rendered incapable of becoming members of a partnership or company.

Agreements entered into between several persons, some of whom are by law incompetent to contract, are not wholly null and void, but are only in some respects less effective than if all the parties to them were competent. Hence there is nothing to prevent a person who is not *sui juris* from being a partner. But if any such person is a partner, his or her want of capacity to contract will necessarily give rise to consequences deserving special notice. These may be considered as they affect, 1, aliens; 2, felons and outlaws; 3, infants; 4, lunatics; 5, married women; and 6, corporations and companies.

(*c*) The law relating to the clergy is now 1 & 2 Vict. c. 106, §§ 29–31; and 4 Vict. c. 14. Although a violation of those laws is attended with the risk of suspension and deprivation, it is expressly enacted that contracts entered into contrary to them shall not be void (see Lewis *v.* Bright, 4 E. & B. 917). Consequently the disability under which the clergy formerly lay, and which rendered all partnerships and companies of which they were *de facto* members, illegal (Hall *v.* Franklin, 3 M. & W. 259), exists no longer.

*1. *Aliens.* *78

There is nothing to prevent an alien, not an enemy, from being a partner, or from holding shares in a company. (*d*) But a public minister of a foreign state, accredited to and received by the Queen, cannot be sued here even in respect of commercial transactions in which he may have engaged; and if, therefore, such a person holds a share in a company, he cannot, while so accredited and received, be sued here, either for calls or in respect of the debts and liabilities of the company. (*e*)

Alien friends.

Alien enemies stand in a very different position from alien friends. When two supreme powers are at war, all persons who, for the time being, are the subjects of either, become in contemplation of the civil tribunals of both, hostile to the subjects of the other; and so long as the war lasts the subjects for the time being of the one country are incapable of entering into any valid contracts with the subjects of the other; and all remedies available for the one against the other, in respect of transactions before the war, are suspended. (*f*) Consequently no partnership can subsist between the subjects of hostile powers (*g*);[1] and if two partners are resident in two different countries, their partnership is determined by a war between those countries. (*h*)[2]

Effects of war on the rights of partners.

These doctrines, however, are only recognized and enforced by the belligerent powers. Neutrals do not apply them to the determination of commercial questions arising between the subjects of belligerent states.

It is to be remembered that whether a person is or is not to be considered as an enemy, depends, not on whether there is war between this

(*d*) A ship may be registered in the name of a company, although some of its members are foreigners, R. *v.* Arnaud, 9 Q. B. 806; and 17 & 18 Vict c. 104, § 18. See, generally, as to aliens, 33 Vict. c. 14.

(*e*) Magdalena Steam Nav. Co. *v.* Martin, 2 E. & E. 94.

(*f*) Albretcht *v.* Sussmann, 2 V. B. 323; Willison *v.* Patteson, 7 Taunt. 440; *Ex parte* Boussmaker, 13 Ves. 71; Potts *v.* Bell, 8 T. R. 548. See the note to Clemontson *v.* Blessig, 11 Ex. 141.

(*g*) See Evans *v.* Richardson, 3 Mer. 469.

[1] See The Rapid, 8 Cranch. 155; Scholefield *v.* Eichelberger, 7 Pet. 585; The San José, Indiana, 2 Gall. 268.

(*h*) See Griswold *v.* Waddington, 15 John. 57, & 16 ib. 438 (Amer.)

[2] See Woods *v.* Wilder, 43 N. Y. 164; Cohen *v.* N. Y. Life Ins. Co. 50 id. 610; Kershaw *v.* Kelsey, 100 Mass. 561; N. Y. Life Ins. Co. *v.* Statham, 93 N. S. 24; Mutual Benefit Life Ins. Co. *v.* Hildyard, 37 N. J. L. 444.

country and his native land, but upon whether there is war be-
*79 tween this country and the country in which he *is voluntarily
resident. It is the place of his residence, and not the place of his his birth, which is of importance in these matters (*i*):[1] and therefore if a foreigner comes over here, enters into partnership here, and dwells here, and then war breaks out between this country and that of which he is a native, the partnership would not, nor would his rights as a partner, be affected by the war, any more than if he were an Englishman. (*j*) On the other hand, if a partnership consists wholly of Englishmen, some of whom reside here and some in another country, and war breaks out between that country and this, the partners have become enemies for all purposes of trade and commerce, just as much as if those abroad were natives of the country in which they reside. (*k*)

With reference to the legality of trade and commerce, a company ought, it is conceived, to be treated as resident not only where its principal place of business is, but wherever it has any place of business. (*l*) It has, however, been determined, that for the purpose of deciding whether a company dwells within a particular district, regard ought to be had rather to the place where its business is principally carried on than to the situation of its subordinate offices. (*m*)

A registered company does not necessarily dwell where its registered office is situate. (*n*)

A note on the subject of foreign companies will be found in the Appendix.

(*i*) See Albretcht *v.* Sussmann, 2 V. & B. 323; Willison *v.* Patteson, 7 Taunt. 440; Houriet *v.* Morris, 3 Camp. 303; Bell *v.* Reid, 1 M. & S. 720.

[1] See Griswold *v.* Waddington, 16 John. 438; The Julia, 8 Cranch. 181.

(*j*) See Wells *v.* Williams, 1 Ld. Raymond, 282, and 1 Salk. 46, in which it was held that a plea of alien enemy was no defense to an action brought by a foreigner domiciled here, though there was war between his country and this.

(*k*) See M'Connell *v.* Hector, 3 Bos. & P. 113; O'Mealey *v.* Wilson, 1 Camp. 482, and compare Roberts *v.* Hardy, 3 M. & S. 533, and *Ex parte* Baglehole, 18 Ves. 525, and 1 Rose, 271.

(*l*) See Carron Co. *v.* Maclaren, 5 H. L. C. 416, and Lewis *v.* Baldwin, 11 Beav. 153, from which it appears that for some purposes at all events companies may be considered as resident in more places than one.

(*m*) See Brown *v.* Lond. and N. W. Rail. Co. 4 B. & Sm. 326; Shield *v.* Great N. Rail. Co. 7 Jur. N. S. 632; Adams *v.* Great W. Rail. Co. 6 H. & N. 404; Taylor *v.* Crowland Gas. Co. 11 Ex. 1.

(*n*) Cesena Sulphur Co. *v.* Nicholson, 1 Ex. D. 428; Calcutta Jute Mills Co. v. Nicholson, ib.; Keynsham Blue Lias Co. *v.* Barker, 2 H. & C. 729.

*2. *Felons and outlaws.* *80

Formerly a felon's or outlaw's share in a partnership or company vested in the crown (*o*); and although a felon or outlaw could contract, he could not sue in his own right until his disability had been removed; *i. e.* in the case of felony until pardon or expiration of the term of punishment; and in case of outlawry, until its reversal (*p*). But no person could plead his own attainder or outlawry as a defense to an action against him. (*q*) As regards outlaws, the law in these respects remains unchanged; the law, however, respecting felons was materially altered by 33 & 34 Vict. c. 23. This act abolished forfeiture for felony (*r*), but empowered the Crown to commit the custody and management of the property of any convict (*i. e.* a person sentenced to death or penal servitude (*s*) to an administrator (*t*), in whom all the convict's property, both real and personal, then becomes vested. (*u*) Moreover, a convict is absolutely disabled from alienating any property or making any contracts, and from suing (*x*), except when lawfully at large under a a proper license (*y*). Provision is also made for the appointment of an interim curator of a convict's property (*z*). Practically this act facilitates the dissolution and winding-up of a partnership in the event of a member being convicted of felony: but it is unnecessary to allude further to this statute in the present place.

3. *Infants.*

An infant may be a partner.[1] But, speaking generally, whilst he is an infant he incurs no liability and is not responsible for the debts of the firm: and when he comes of

Infant partners

(*o*) Bac. Ab. Felony and outlawry; Co. Lit. 128.

(*p*) Ib. and See Bullock *v.* Dodds, 2 B. & A. 258.

(*q*) Foster's Cr. L. 61.

(*r*) § 1.

(*s*) § 6.

(*t*) § 9.

(*u*) § 10.

(*x*) § 8.

(*y*) § 30.

(*z*) § 21, et seq.

[1] An infant may be a partner, and his father, though indebted and insolvent, may release to his son all claim to his services; and the consent of the father to the son's becoming a partner is a release of his services. Penn *v.* Whitehead, 17 Gratt. 503.

An infant's partnership agreement is not void, but voidable only. Dunton *v.* Brown, 31 Mich. 182.

Where a father invests his own funds and personal services, or the funds of his

age, or even before, he may, if he chooses, disaffirm past transactions. (*a*)[a]

*81 *The irresponsibility of an infant for the debts of a partnership of which he is a member, is an obvious consequence of his general incapacity to bind himself by contract, and does not require to be supported by any special authority. (*b*) It might, perhaps be thought that an infant who held himself out as a partner would be liable to persons trusting to his representations if they did not know him to be under age; but this is not so (*c*);[1] and as

children in his hands as guardian, arising from an unauthorized sale of their property, in a partnership for their benefit, and the children afterwards seek to enforce the partnership in equity, the other partner cannot avail himself of these facts to avoid the contract. Stein *v.* Robertson, 30 Ala. 286.

Where one being a widow and natural tutrix of her minor children, and having the possession and administration of the property of her deceased husband's succession during her life, entered into a partnership with the heirs, who were of full age, and slaves and other property of the succession were employed and used by the partnership: *Held*, that the minor heirs were not, and could not be made by their natural tutrix, members of the partnership; and that they, consequently, after her death, had the right to sue for and recover from the surviving partners a debt due them by the partnership, before a settlement and liquidation of partnership affairs. Cuillé *v.* Gassen, 14 La. Ann. 5.

(*a*) See Goode *v.* Harrison, 5 B. & A. 157-9; *Ex parte* Taylor, 8 De G. M. & G. 254.

[a] See Dunton *v.* Brown, *supra*, to the point that an infant's voidable contract of partnership is not avoidable by him till he becomes of age. As to when an infant may avoid his voidable acts, see generally, Ewell's Lead. Cases on Inf. & Cov. 92, 96, and cases cited. As to what amounts to a ratification of a partnership by an infant, see Ewell's Lead. Cases, 169, 170, 175.

A minor entered into partnership in Sussex county, with two others, and put in $1,000. Before he came of age the partnership was dissolved, the minor receiving his $1,000. After the dissolution, he removed to Huntington county, and A. recovered a judgment against the members of the firm, including the minor, without his knowledge. A. transferred the judgment to B. Three years afterwards, B. brought an action on the judgment, and recovered a second judgment, no process being served on the minor. B. caused an execution to be issued to the sheriff of Huntington county, and to be levied on the property of the minor there. The minor filed a bill, stating the foregoing facts, charging fraud, etc., and obtained an injunction to stay proceedings on the execution. Vansyckle *v.* Rorback, 6 N. J. Eq. 234.

(*b*) Chandler *v.* Parkes, 3 Esp. 76; Jaffray *v.* Frebain, 5 ib. 47; Gibbs *v.* Merrill, 3 Taunt. 307; and Burgess *v.* Merrill, 4 ib. 468, show that an infant partner ought not to be joined as a defendant in an action against the firm.

(*c*) See Price *v.* Hewitt, 8 Ex. 146; Johnson *v.* Pye, Vin. Ab. *Enfant*, H. 2 pl. 16; Glossop *v.* Colman, 1 Stark. 25; Green *v.* Greenbank, 2 Marsh. 485.

[1] To the point that the false and fraudulent declaration of an infant, that he is of full age, made at the time of enter-

an infant is not responsible for the torts of his agent, an infant partner cannot be held liable for the misconduct of his co-partners. The irresponsibility of an infant as a partner, seems therefore to be complete, except in cases of fraud.

But an infant who was guilty of fraud was not so free from liability in equity, as he was at law (*d*); and since the Judicature act, the equitable as distinguished from the legal principles applicable to frauds by infants, will, it is presumed, prevail. In accordance with these principles, although, as a rule an infant cannot be made bankrupt (*e*); yet if he fraudulently represents himself as of age, and obtains credit by his false representations, and is made bankrupt, the adjudication against him will not be superseded, and his deceived creditors will be paid out of his estate. (*f*)

Infant shareholders.

Moreover, notwithstanding the general irresponsibility of an infant, he cannot, as against his co-partners, insist that in taking the partnership accounts he shall be credited with profits, and not be debited with losses. The infant partner must either repudiate or abide by the agreement under which alone he is entitled to any share of the profits.[9] So an infant cannot hold shares, and decline to pay the calls payable in respect of them. He may, if he chooses, repudiate the shares, and so get rid of * his liabilities (*g*); but if he does not repudiate the shares, *82

ing into a contract, does not prevent him from avoiding the contract at his election: see Burley *v.* Russell, 10 N. H. 184; Conroe *v.* Birdsall, 1 John. Cas. 127; Ferguson *v.* Bobo, 54 Miss. 121; Merriam *v.* Cunningham, 11 Cush. 40; Norris *v.* Vance, 3 Rich. 164; Carpenter *v.* Carpenter, 45 Ind. 142; Curtin *v.* Patton, 11 S. & R. 309; Stoolfoos *v.* Jenkins, 12 id. 403; Brown *v.* McCune, 5 Sandf. 224; Ewell's Lead. Cas. 219.

(*d*) See Wright *v.* Snowe, 2 De G. & S. 321.

(*e*) *Ex parte* Henderson, 4 Ves. 163; *Ex parte* Lees, 1 Deac. 705; Belton *v.* Hodges, 9 Bing. 365.

(*f*) See *Ex parte* Watson, 16 Ves. 265; *Ex parte* Bates, 2 M. D. & D. 337; *Ex parte* Unity Banking Assoc., 3 De G. & J. 63.

[9] To the point, that an infant's ratification or avoidance must be *in toto*, if at all, see Ewell's Lead. Cases, 124, 161, 164, and cases cited.

(*g*) Newry and Enniskillen Rail. Co. *v.* Coombe, 3 Ex. 565, and the cases referred to in book iv, under the head Contributories. The repudiation must be either before or within a reasonable time after majority. Dublin and Wicklow Rail Co. *v.* Black, 8 Ex. 181; and see Mitchell's case, 9 Eq. 363; and Ebbett's case, 5 Ch. 302, and others of that class. If a company is being wound up and is insolvent, of course it will be for the benefit of an infant shareholder to repudiate his shares, and so avoid being made a contributory. See Reid's case, 24 Beav. 318; and *infra*, book iv, under the head Contributories.

he must pay calls like any other shareholder. (*h*) *Qui sentit commodum sentire debit et onus.*

If a company's memorandum of association is signed by an infant, his signature is by no means inoperative. The incorporation of the company is not affected by it, and he becomes a member until he repudiates his share. (*i*)

An infant who has had shares in a company transferred to him, may be rejected as a shareholder by the company on ascertaining the fact of his infancy. (*j*)

Avoidance of infant's contract.

An infant partner may avoid the contract into which he has entered, either before or within a reasonable time after he has come of age. (*k*)[1] If he avoids the contract, and has derived no benefit from it, he is entitled to recover back any money paid by him in part performance of it (*l*); but he cannot do this if he has already obtained advantages under the contract, and cannot restore the party contracting with him to the same position as if no contract had been entered into. (*m*)[2]

Ratification by infant of his contract.

If, when an infant partner comes of age, he is desirous of retiring from the firm, he should express his determination speedily and unequivocally.[3] It is true that by the Infants' relief act, 1874 (*n*), promises made by a person who *83 has * attained twenty-one to pay debts contracted before that age cannot be enforced; but a person who retains a share in a partnership or company cannot retain it without its incidental obligations (*o*); and the doctrine of holding out, is itself sufficient to impose liability upon an adult,

Holding out after attaining 21.

(*h*) See Cork and Bandon Rail. Co. *v.* Cazenove, 10 Q. B. 935; Leeds and Thirsk Rail. Co. *v.* Fearnley, 4 Ex. 26; North West. Rail. Co. *v.* M'Michael, 5 Ex. 114. The Birkenhead, Lancashire, &c., Rail. Co. *v.* Pilcher, 5 Ex. 24, is not opposed to these; see S. C. ib. 121.

(*i*) See Nassau Phosphate Co., 2 Ch. D. 610.

(*j*) See Symon's case, 5 Ch. 298, and *infra*, in book iv.

(*k*) Co. Litt. 380 *b*. Newry and Enniskillen Rail. Co. *v.* Coombe, 3 Ex, 565; Dublin and Wicklow Rail. Co. *v.* Black, 8 Ex. 181.

[1] See *ante*, p. 80, note.

(*l*) Corpe *v.* Overton, 10 Bing. 253.

(*m*) Holmes *v.* Blogg, 8 Taunt. 508. *Ex parte* Taylor, 8 De G. M. & G. 254. Compare Mann's case, 3 Ch. 459, and Curtis's case, 6 Eq. 455, where the infant had sold some shares, but not the rest.

[2] See this subject considered and the cases collected in Ewell's Lead. Cases in Inf. and Cov. 111, 114, 119, 123, *et seq.*

[3] See, generally, Ewell's Lead. Cases, 169, 170; Tobey *v.* Wood, 123 Mass. 88.

(*n*) 37 & 38 Vict. c. 62, § 2.

(*o*) See Cork and Bandon Rail. Co. *v.* Cazenove, 10 Q. B, 935, *per* Coleridge and Erle, JJ.; Ebbett's case, 5 Ch. 302; compare Baker's case, 7 Ch. 115.

although he may not long have attained his majority. This is well exemplified in Goode *v.* Harrison. (*p*) There an infant was a member of a firm, and he was known to be a member. After he had attained twenty-one, he did not expressly either affirm or disaffirm the partnership. He was held liable for debts incurred by his co-partners subsequently to that time. A person who, before he comes of age, represents himself as a partner, must, when he comes of age, take care to notify that he has ceased to be a partner if he desires to avoid liability.

4. *Lunatics.*

If a lunatic enters into a contract with a person who acts *bonâ fide*, and who does not know of the incapacity under which the lunatic labors, the lunatic is so far bound by the contract, that if it has been executed he cannot avoid it. (*q*)[1] So if a person *bonâ fide* contracts with a lunatic, without knowing him to be so, and performs the contract, lunacy would seem to be no defense to an action for remuneration for what has been done. (*r*) It is not, therefore, possible to lay down as a universal proposition that contracts entered into by persons who are lunatic are void, nor consequently that such persons are incapable of being partners. Lunatic partners.

Any doubt, however, which might exist upon this subject in point of principle is removed by those decisions which have settled that an existing partnership is not dissolved by the mere fact that one of its members has become lunatic, and that, notwithstanding his lunacy, he is entitled to share the *profits made subsequently by his co-partners. (*s*) To these authorities, which will be examined hereafter, may be added the case of *84

(*p*) 5 B. & A. 147.

(*q*) See Molton *v.* Camroux, 2 Ex. 487, and 4 ib. 17; Beavan *v.* McDonnell, 9 ib. 309, and 10 ib. 184.

[1] The principle of Molton *v.* Camroux is adopted or approved in Campbell *v.* Hooper, 3 Sm. & G. 153; Elliott *v.* Ince, 7 DeG. M. & G. 487; Hassard *v.* Smith, 6 Ir. Eq. 429; Young *v.* Stevens, 48 N. H. 133; McCormick *v.* Littler, 85 Ill. 62; Behrens *v.* McKenzie, 23 Iowa, 343; Fitzhugh *v.* Wilcox, 12 Barb. 237; Person *v.* Warren, 14 id. 488; Beals *v.* See, 10 Penn. St. 56; Yonger *v.* Skinner, 14 N. J. Eq. 389; Ballard *v.* McKenna, 4 Rich. Eq. 358; Sims *v.* McLure, 8 id. 286; Wilder *v.* Weakley, 34 Ind. 81. See, also, Ewell's Lead. Cases, 626.

(*r*) See Baxter *v.* The Earl of Portsmouth, 5 B. & C, 170; Brown *v.* Jodrell, 3 C. & P. 30.

(*s*) Jones *v.* Noy, 2 M. & K. 125.

Sadler *v.* Lee (*t*), in which it was held that if a member of a going partnership becomes imbecile, he is nevertheless responsible for the subsequent misconduct of the other members. It seems, therefore, that by the law of this country, a lunatic is capable of being a partner; but all dealings and transactions with him when his lunacy is known are liable to be impeached.

5. *Married women.*

Married women partners.

A married woman who has no separate estate is wholly incapacitated from entering into any binding contract (*u*)[1] except 1, when the husband is a convicted felon (*x*); 2 when the husband and wife are judicially separated (*y*); 3, where the wife is protected from her husband by an order obtained under the divorce acts; (*z*) 4, when the husband is an alien enemy and abroad (*a*); and 5, she is enabled to effect a policy of insurance on her own life or that of her husband for her separate use. (*b*) In these cases the wife is as capable of contracting as if she were unmarried. By the custom of London, moreover, a married woman may be a trader, and contract as if she were not married. (*c*)[2] Neglecting these exceptions, it seems clear that a married woman without separate estate, having no capacity to contract, cannot be a partner; and that if she is *de facto* a partner, nevertheless it is her husband and not herself who must be considered as sustaining that character. (*d*) And, as in the case of infants, so in the case of

(*t*) 6 Beav. 324.

(*u*) Marshall *v.* Rutton, 8 T. R. 545.

[1] To the point that at common law the contracts of a *feme covert* are void, see 1 Bish. Mar. Wom. § 39; Ewell's Lead. Cases, 312, where the cases are fully collected.

(*x*) See *Ex parte* Franks, 7 Bing. 762.

(*y*) 20 & 21 Vict. c. 85, §§ 25, 26.

(*z*) 20 & 21 Vict. c. 75, § 21, and 21 & 22 Vict. c. 108, §§ 6–10.

(*a*) Derry *v.* Mazarine, 1 Ld. Raymd. 147; Barden *v.* Keverberg, 2 M. & W. 61.

(*b*) 33 & 34 Vict. c. 93, § 10.

(*c*) See as to this, Beard *v.* Webb, 1 Bos. & Pul. 93.

[2] In South Carolina, by the decisions of the courts, *feme covert* are allowed to become *feme sole* traders after the manner of the custom of London: Newbiggin *v.* Pillans, 2 Bay, 162; Surtell *v.* Brailsford, id. 333; Dial *v.* Neuffer, 3 Rich. 78; Hobart *v.* Lemon id. 131. See, also, Wallace *v.* Rippon, 2 Bay, 112; Rouillier *v.* Wernicki, 3 E. D. Smith, 310; Wieman *v.* Anderson, 42 Pa. St. 311; Ewell's Lead. Cas. 314.

(*d*) See Burlinson's case, 3 De G. M. & G. 18; Luard's case, 1 De G. F. & J. 533; and compare *Ex parte* Rhodes, 7 W. R. 510. See, also, Cosio *v.* De Bernales, Ryan & Moody, 102, where a husband and wife were partners in Spain.

married women, holding themselves out as partners, does not *subject them to the responsibilities which are incurred by *85 other persons who act in a similar way. (*e*)[1]

But a married woman who has separate estate is as to that regarded as a *feme sole:* and debts and obligations incurred by her either expressly or impliedly on the credit of that estate can be enforced against it, although not against her personally. (*f*) Supposing, therefore, that a married woman partner has separate estate, it will be liable for the debts of the partnership; and in a limited sense she will be a partner. (*g*) Whether the husband of a married woman entitled to a share in a partnership for her separate use is liable to third parties as a partner, is a question which has not been judicially determined; but unless she could be regarded as his agent it is apprehended that he would not be liable. It has been decided that where a married woman is a shareholder in a company, and is herself registered as such, her husband is not liable either to be made a contributory on the winding up of the company (*h*), or to be sued by *scire facias* by a creditor thereof. (*i*) These cases, no doubt, turned on particular statutory enactments; but since Cox *v.* Hickman and the Judicature act the husband's liability must, it is conceived, depend on principles of agency. (*j*)

Position of married women with separate estate.

By the married woman's property act, 1870 (33 & 34 Vict. c. 93, § 4), a married woman entitled to fully paid up shares in a joint-

(*e*) See the Liverpool Adelphi Loan Association *v.* Fairhurst, 2 Ex. 422.

[1] In an action against a partnership, the coverture of a female member of the firm, at the time of contract, may be given in evidence to defeat the action. Brown *v.* Jewett, 18 N. H. 230.

A wife may contract with her husband in her business, and may enter into a valid partnership agreement with him under the laws of the State of New York; such being the fact, the husband may lawfully use the firm name "J. Zimmerman & Co.;" and the term "Co." legally representing the wife does not offend the provisions of the act of 1833 (Chap. 281), providing that where the designation "& Co." is used, it shall represent an actual partner. Zimmerman *v.* Erhard, 58 How. Pr. 11. See, however, *contra*, Plumer *v.* Lord, 7 Allen, 481.

(*f*) See Johnson *v.* Gallagher, 3 De G. F. & J. 494; Picard *v.* Hine, 5 Ch. 274.

(*g*) See Matthewman's case, 3 Eq. 781, where she was held a contributory. See as to a married woman's separate trade, Ashworth *v.* Outram, 5. Ch. D. 923.

(*h*) Angas' case, 1 De G. & Sm. 560; *Ex parte* Rhodes, 7 W. R. 510. Compare Luard's case, 1 De. G. F. & J. 533.

(*i*) Ness *v.* Angas, 3 Ex. 805; Dodgson *v.* Bell, 5 ib. 967. See *infra*, book iv, Contributories.

(*j*) See *ante*, p. 38, *et seq*, and Luard's case, 1 De G. F. & J. 533.

stock company to her separate use may compel the company to register her in respect of them. (*k*)

*86 *6. *Corporations and Companies.*

Corporations, &c., may be partners.

There is no general principle of law which prevents a corporation from being a partner with another corporation or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its constitution.[1] It has been assumed by the legislature, in many of the statutes relating to companies, that corporations may lawfully be shareholders (*l*), and at common law one corporation may be a member of another. (*m*) Accordingly it has been held that where the above principle does not apply, one com-

(*k*) R. *v.* Carnatic Rail. Co. L. R. 8 Q. B. 299.

[1] Two firms may be partners in one conjoint firm. *In re* Hamilton, 1 Fed. Rep. 800.

The firm of S. & Co. engaged in the business of making toys, formed a copartnership with the firm of B. & Co., engaged in the same business, for the sale of their goods in New York, under the name of the American Toy Company. Afterwards, in consequence of the death of a member of the firm of S. & Co., the remaining members, with the widow and minor children of the deceased member, procured an act making them a corporation, the preamble stating that for many years they had been engaged in the manufacture of skates, toys, tools and other articles of wood or metal; that it had a large amount of real and personal estate used in the business; that the business was profitable, and that it was for the interest of all concerned that it should not be discontinued, and that the act of incorporation was sought for the purpose of enabling the petitioners to carry on the business of the late firm; and the act providing that the corporation should have power to carry on the manufacture of skates, toys, tools, and other articles of wood or metal, and engage in trade in connection therewith, and that the property of the firm should become vested in the corporation. The business of the firm and its transactions with the toy company had been the same after the death of the deceased member, and were continued in the same manner by the corporation: *Held*, that the charter of the corporation by necessary intendment authorized it to take the place of the firm as a member of the Toy Company, and that it had become such a member. Butler *v.* American Toy Company, 46 Conn. 136.

The business of the firm of S. & Co. having been continued after the death of one of its members precisely as before, the representatives of the deceased member, taking the benefit of his interest, the firm was not to be regarded as dissolved by his death. Butler *v.* American Toy Co. 46 Conn. 136.

(*l*) See for example, 7 Wm. 4 & 1 Vict. c. 73, §§ 6 & 10; 7 & 8 Vict. c. 110, §§ 3, 7, No. 8, and § 50.

(*m*) Grant on Corporations, p. 5.

pany may hold shares in another (*n*); although not in a benefit building society. (*o*) Having regard, however, to the principles which relate to the employment of funds of companies, it may be considered that as a general rule it is *primâ facie ultra vires* for one company to hold shares in another (*p*), or to enter into partnership with it. These questions will be examined hereafter when the powers of companies are discussed.

(*n*) *Ex parte* Contract Corporation, 3 Ch. 105; Royal Bank of India's case, 4 Ch. 252, and 7 Eq. 91.

(*o*) Dobinson *v.* Hawks, 16 Sim. 407.

(*p*) See Great W. Rail. Co. *v.* Metrop. Rail Co. 9 Jur. N. S. 562, and *Ex parte* Contract Corporation, 3 Ch. 105.

*87

*CHAPTER IV.

OF THE EVIDENCE BY WHICH A PARTNERSHIP OR *QUASI*-PARTNERSHIP MAY BE PROVED.

Evidence by which a partnership or *quasi*-partnership may be proved.

THE contract of partnership is one of those which does not require to be entered into with any particular formalities. By the common law of this country, a partnership may be constituted without any official act, such as registry, without any instrument under seal, and even without any writing whatever; and this is the law at the present time, except so far as it has been altered by the statute of frauds, by the acts relating to marine insurance (*a*), and by those modern acts relating to companies which will be noticed hereafter. But although a partnership may be constituted without any deed or writing, still a person who has entered into a mere verbal agreement for a partnership with another, will not be able to sustain an action for its breach, unless he can prove the terms upon which the partnership was to be entered into. (*b*)

Statute of frauds.

The only statutory enactment applicable to ordinary partnership, is the statute of frauds, the 4th section of which enacts, amongst other things:

"That no action shall be brought whereby to charge any person upon any contract or sale of land, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(*a*) By 30 Vict. c. 23, § 7, agreements for marine insurance must be in writing and stamped; and a mutual marine insurance society which infringes these enactments is an illegal society. See *infra*, book i. c. 6, § 1.

(*b*) Figes *v.* Cutler, 3 Stark. 139.

This enactment applies as well to an agreement for a partnership to commence more than a year from the date of the *agreement (*c*), as to an agreement for a present partnership to last more than a year from its commencement (*d*). But if in either case the parties have acted on the agreement and become partners, the statute ceases to be applicable; for then the ordinary equitable doctrines relating to part-performance come into operation. (*e*)

*88 Future partnerships, &c.

With respect to that part of the 4th section of the statute of frauds which relates to lands, it is held,—1, that a partnership constituted without writing is as valid as one constituted by writing; (*f*)[1] and 2, that if a partnership is

Partnerships in land.[2]

(*c*) See *per* Holroyd, J., in Williams *v.* Jones, 5 B. & C. 108.

(*d*) *Ibid.* But see as to this McKay *v.* Rutherford, 13 Jur. 21.

(*e*) See Baxter *v.* West, 1 Dr. & Sm. 173, where the partners had acted on, and were held bound by, an unsigned memorandum, continuing a partnership for seven years. See, also, Williams *v.* Williams, 2 Ch. 294, and *per* Turner, L. J. in Burdon *v.* Barkus, 4 De G. F. J. 47.

[1]There may be a partnership for the buying and selling of lands. Dudley *v.* Littlefield, 21 Me. 418. See, also, Davis *v.* Cook, 14 Nev. 265; Kramer *v.* Arthurs, 7 Penn. St. 165; Bissell *v.* Harrington, 18 Hun, 81; Potts *v.* Waugh, 4 Mass. 424; Fall River Co. *v.* Borden, 10 Cush. 458; Smith *v.* Burnham, 3 Sumn. C. C. 435; Chester *v.* Dickinson, 54 N. Y. 1; Ludlow *v.* Cooper, 4 Ohio St. 1; Brady *v.* Calhoun, 1 Penn. St. 140; Smith *v.* Jones, 12 Me. 332; Olcott *v.* Wing, 4 McLean, 15.

So in mining adventures. Sauntry *v.* Dunlap, 12 Wis. 364.

So, for owning and operating a street railway. O'Neil *v.* Lamb, 6. N. W. Rep. 59.

(*f*) Essex *v.* Essex, 20 Beav. 449.

[2]The plaintiff entered into an agreement with his co-partners, Frederick H. and Edward A. Bissell, by which they agreed to purchase a farm for their joint benefit, each to pay one-third of the price, the title to be taken in the name of Frederick H.; the farm to be sold in parcels, the money received on the sale to be applied on the purchase price of the farm, and each to be entitled to one-third of the surplus, if any, or of the land remaining unsold. This agreement was carried into effect, and thereafter another lot was purchased and the title taken in the name of Frederick H., and a building was put thereon with a portion of the proceeds of the sales. There was no express agreement, either verbal or otherwise, on the part of Frederick H. to convey any part of the farm or of the lot to his co-partners, or either of them. Subsequently the partnership between the parties was dissolved, the plaintiff, Theron E. Bissell, verbally retaining his interest in the real estate. Frederick H. and Edward A. having made a general assignment, the plaintiff brought this action to compel the assignee to convey to him an equal, undivided third part of the land: *Held*, that the arrangement was, in effect, a partnership agreement to speculate in real estate. That as such it was valid though not reduced to writing. And that plaintiff was entitled to judg-

proved to exist, then it may be shown by parol evidence that its property consists of land. This was first clearly laid down in Forster *v.* Hale (*g*), where a person attempted to obtain an account of the profits of a colliery on the ground that it was partnership property, and it was objected that there was no signed writing, such as the statute required. But to this the Lord Chancellor observed:

Forster v. Hale.

"That was not the question; it was whether there was a partnership. The subject being an agreement for land, the question then is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circ-

ment. Bissell *v.* Harrington, 18 Hun, 81.

M. and S. were partners, and the former purchased a tract of land of R. which was occupied by the partners for the uses of the firm. In a suit against R., to compel the latter to execute a conveyance of the land to S., and the heirs of M. after his decease: *Held*, that parol evidence was admissible to prove the partnership, and that the property was purchased with the funds of the firm, and for the use thereof, and in pursuance of the partnership agreement. Scruggs *v.* Russell, McCahon (U. S. Ct. Kansas) 39.

Where a proposition to form a partnership for the purpose of buying and selling lands is accepted and acted upon, and the contract is fully executed, it is too late to deny the existence of the contract, or complain of the manner in which it was entered into; and after having received the full benefit of the transaction, and availed himself of all the advantages arising from the services rendered by his co-partner, the other partner cannot be heard to charge bad faith on the part of his co-partner in making a purchase of land. Hunter *v.* Whitehead, 42 Mo. 524.

A co-partnership which is entered into and commenced immediately, is not invalid, although one of the declared objects of the co-partnership is to purchase real estate for the purposes of the firm, and as a site for the transaction of its business. Smith *v.* Tarleton, 2 Barb. Ch. 336. See, further, upon the general subject, Williams *v.* Gillies, 75 N. Y. 197.

On the other hand, it has been held in Alabama that a parol agreement of co-partnership, for the purchase of lands, is within the statute of frauds, and will not be enforced in equity. Larkins *v.* Rhodes, 5 Port. 195.

So in California, a partnership for the purchase and sale of lands must be evidenced by writing. Gray *v.* Palmer, 9 Cal. 616.

In North Carolina it is held that a parol contract for the formation of a partnership, by which one of the partners agrees to sell land to the firm, is void *in toto* at the option of either party. Clancy *v.* Craine, 2 Dev. Eq. 363.

A partnership in growing crops may be formed and proved by parol; but not a partnership in the crops, arising out of an alleged particular partnership in lands and negroes. It is not a partnership by contract, but by consequence of an alleged partnership in immovables. Gantt *v.* Gantt, 6 La. Ann. 677. See, also, Dunbar *v.* Bullard, 2 La. Ann. 810; Benton *v.* Roberts, 4 La. Ann. 216, as to the rule in Louisiana.

(*g*) 5 Ves. 309.

cumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are *by operation of law* held for the purposes of that partnership."

Upon the authority of this case, the Vice-Chancellor Wigram, in Dale *v.* Hamilton (*h*), held that an agreement to form a partnership for the purpose of buying and selling land might be proved by parol; that it might then be shown by parol, that certain land been bought for the purposes of the partnership, and, consequently, that the plaintiff was *entitled to a share of the profits obtained by its re-sale. The Vice-Chancellor directed an issue as to the fact of partnership, but his decision is an authority for the proposition that the statute of frauds does not preclude a person from establishing by parol an agreement to form a partnership for the purpose of buying and selling land at a profit. (*i*) Dale v. Hamilton. *89

This is certainly going a long way in repealing the statutes of frauds. Both in Forster *v.* Hale and in Dale *v.* Hamilton, there was a signed writing showing a trust in the plaintiff's favor, and this circumstance was relied on by Sir William Grant in the former case (*j*), and by Lord Cottenham in the latter (*k*); but, curiously enough, the signed writing was not made the foundation of the decision of Lord Rosslyn in Forster *v.* Hale, nor that of Vice-Chancellor Wigram in Dale *v.* Hamilton, the grounds of their decisions having been those above explained.

In connection with these cases, it is necessary to advert to the more recent decision of Caddick *v.* Skidmore. (*l*) There the plaintiff alleged that it had been agreed between him and the defendant, that they should become partners in a colliery and share the profits equally. The plaintiff sought to enforce that agreement. The defendant denied the alleged agreement, and asserted that the true agreement was that the plaintiff and the defendant should share the royalties obtained from the colliery. The defendant also set up the statute of frauds as an answer to the plaintiff's claim. The Lord Chancellor held that the only agreement proved was one to the effect that the plaintiff and defendant Caddick v. Skidmore.

(*h*) 5 Ha. 369, affirmed 2 Ph. 266.
(*i*) See, too, Cowell *v.* Watts, 2 H. & Tw. 224.
(*j*) Forster *v.* Hale, 3 Ves. 696.
(*k*) Dale *v.* Hamilton, 2 Ph. 266.
(*l*) 2 De G. & J. 52.

should become partners in the colliery in this sense, that it was to be demised upon royalties, and that the royalties were to be divided; and his lordship held that as this agreement was not in writing, the statute of frauds afforded a defense to the suit.

What the real agreement in this case was could not be satisfactorily made out from the evidence; the plaintiff did not prove any such agreement as was alleged by him; and taking the agree-
*90 ment to have been to the effect stated by the Lord *Chancellor, it would seem that co-ownership rather than co-partnership was contemplated between the parties. But even if this were so, the case can hardly be considered as leaving the authority of Vice-Chancellor Wigram's decision in Dale *v.* Hamilton, wholly unshaken, although it does not affect the decision in Forster *v.* Hale.

Question of partnership or no partnership, a mixed question of law and fact.

The question whether a partnership does or does not subsist between any particular persons is a mixed question of law and fact, and not a mere question of fact.[1] If it comes before a jury the question must be decided by them; they, taking their own view of the effect of the evidence before them, are bound to apply to the facts established to their

[1] What is a partnership, is a question of law; its existence is a question of fact. Beecham *v.* Dodd, 3 Harr. 485; Gilpin *v.* Temple, 4 Id. 190; Doggett *v.* Jordan, 2 Fla. 541; Drake *v.* Elwyn, 1 Cai. 184; Dwinel *v.* Stone, 30 Me. 384.

Where the question as to whether under the circumstances a copartnership existed, is dependent upon inferences to be drawn and is a matter of doubt; the question is one of fact for the jury upon proper instructions. Butler *v.* Finck, 10 N. Y. Wkly. Dig. 163.

Where two creditors claimed the same fund, one as the creditor of A, B, C & Co., and the other under D & C, and there was evidence that these firms were composed of the same persons, and known under the different names, it was left to the jury to decide that fact. McDuffie *v.* Bartlett, 3 Pa. St. 317.

The defendant's evidence tended to show that B. and W. were not members of an association. Evidence tending to show that they were members was introduced by the plaintiffs: *Held*, that it was properly submitted to the jury, as a matter of fact, to determine whether or not they were members, and that in determining the question, their intent and understanding in relation thereto, at the time they were alleged to have become members, as gathered from the evidence, was a material consideration for the jury. Smith *v.* Hollister, 32 Vt. 695.

Where the terms of the agreement and the facts are admitted, it is a question of law whether there was a partnership or not. Everitt *v.* Chapman, 6 Conn. 347; Terrill *v.* Richards, 1 Nott & M. 20; McGrew *v.* Walker, 17 Ala. 824.

But a witness who knows the fact, may, nevertheless, state in so many words, that the parties were partners. The party against whom the testimony is offered, if he thinks the statement is founded on opinion merely, should interrogate the

satisfaction, those legal principles which the Court may lay down for their guidance. (*m*)

In considering the evidence which it is necessary to adduce in order to establish the existence of a partnership, two perfectly distinct questions immediately suggest themselves, viz:

1. What is to be proved?
2. How is it to be proved?

1. With reference to the first question, the distinction between partnerships and *quasi*-partnerships is all-important;[2] for it by no means follows, that persons who are not partners are not liable as if they were; nor does it follow that persons who are liable as if they were partners are partners in reality.[3] This has been already explained; and, in fact, the answer to the first of the above two questions will be found in that portion of the present work in which the nature of the contract of partnership was discussed; and it will therefore only be necessary to recapitulate as shortly as possible the propositions there established.

What has to be proved in order to establish the existence of a partnership.

The existence of a real partnership may be established by showing—

True partnership.

*1. A distinct agreement for a partnership in so many words,[1] or, *91

2. An agreement to share profit *and* loss; or,

witness as to the sources of his knowledge. McGrew *v.* Walker, 17 Ala. 824.

(*m*) See Fox *v.* Clifton, 9 Bing. 117. Formerly the Court of Chancery used to direct an issue to try a disputed question of partnership, or no partnership, if there was any real difficulty about it. See McGregor *v.* Bainbrigge, 7 Ha. 164, note, and the cases there cited, but this is no longer the practice.

[2] To prove partnership, the evidence must be stronger as between partners, than others. Robinson *v.* Green, 5 Harr. 115.

[3] Where in a petition a person is charged as a partner, and the proof shows merely that he has held himself out as a partner, is no variance. Rippey *v.* Evans, 22 Mo. 157.

[1] Where a person has not in any manner been held out to the community as a partner in business, and a plaintiff, seeking nevertheless to charge him as such a partner, produces a written agreement between the parties to prove such partnership, the whole of the agreement must be read together. The plaintiff cannot be permitted to use such parts of the agreement as tend to establish a partnership, and reject such parts as tend to show the contrary. Manhattan B. Mfg. Co. *v.* Sears, 1 Sweeny, 426.

3. An agreement to share profits; or,

4. Such a state of things as is sufficient to establish a *quasi*-partnership. (*n*)

The first two of these will be conclusive; and the third and fourth will be *primâ facie* evidence of the existence of a partnership in those cases in which the act of 28 & 29 Vict. c. 86 does not apply.

The distinction, however, between existing and contemplated partnerships must not be overlooked; and it may be useful to remind the reader that evidence which would fail to establish a *quasi*-partnership must, *a fortiori*, fail to establish a real partnership between the same persons.

Quasi-partnership.

For the purpose of proving the existence of a *quasi*-partnership between several persons, it is no longer sufficient to show either that they share profits or that there has been a holding out to the plaintiff; for although the second is sufficient, the first is not. Sharing profits is only evidence of *quasi*-partnership where agency may be inferred, and where the recent act 28 & 29 Vict. c. 86, does not apply. (*o*)

The distinction, moreover, between existing and contemplated partnerships is of as much importance here as before; and it is obvious that if in attempting to establish a *quasi*-partnership, a real partnership should be shown to exist, the liability of the persons sought to be charged will only be established the more completely.

What has to be proved in order to show that a person is a member of a company, and to establish his liability to be placed on the list of contributories, or to be sued for calls, or to have execution for a debt of the company issued against him, or, on the other hand, to establish his rights as a shareholder, will be pointed out hereafter.

2. With reference to the means of proof, it is the province of a writer on evidence to discuss the method by which facts to be established may be proved; and it is not consistent with * the plan of this work to examine the principles relative to the production or admissibility of evidence. At the same time, a few observations on some points of practical importance with respect to the mode of proving the existence of a

Means of proof.

*92

(*n*) That this is *primâ facie* evidence of a real partnership, see Peacock *v.* Peacock, 2 Camp. 45.

(*o*) See, as to this, *ante*, p. 39.

partnership are laid before the reader, in the hope that they may be found of use.

As partnerships, even for long terms of years, very often exist in this country without any written agreement at all, the absence of direct documentary evidence of any agreement for a partnership is entitled to very little weight.[1] As be- Where there is no writing.

[1] No written articles are necessary to constitute a co-partnership which is to take effect immediately. Smith *v.* Tarlton, 2 Barb. Ch. 336; Randell *v.* Yates, 48 Miss. 685. Buffum *v.* Buffum, 49 Me. 108; York *v.* Clemens, 51 Ind. 358. See, also, Buckner *v.* Rees, 34 Mo. 357; Villa *v.* Jonte, 17 La. Ann. 9.

A written agreement may be necessary to bind the parties to enter into a future co-partnership which is not to commence until after the expiration of a year. Smith *v.* Tarlton, *supra*. But even where there is a parol agreement to enter into a co-partnership at a future day, and specifying the terms of such co-partnership, *it seems* that if the parties go into co-partnership at the prescribed time, without agreeing upon any new terms, the former parol agreement may be presumed to constitute the terms upon which such co-partnership was entered into and carried on. Smith *v.* Tarlton, *supra*.

A partnership may be proved by parol evidence that the alleged partners severally admitted the fact, or held themselves out as such, although it appear on the trial that there was a written agreement and no notice to produce it is proved. Bryer *v.* Weston, 16 Me. 261; Anderson *v.* Levan, 1 Watts & S. 334; Griffin *v.* Doe, 12 Ala. 783; Dixon *v.* Hood, 7 Mo. 414; Widdifield *v.* Widdifield, 2 Binn. 245; Gilbert *v.* Whidden, 20 Me. 367; King *v.* Ham, 4 Mo. 275; Field *v.* Tenney, 47 N. H. 513; Robinson *v.* Green, 5 Harr. 115. See, however, Cochran *v.* Perry, 8 Watts & S. 262.

Some authorities, however, require a notice to produce the writing, or an excuse for its non-production before parol evidence will be received. Bonnafee *v.* Fenner, 14 Miss. 20; Hastings *v* Hopkinson, 28 Vt. 108; Price *v.* Hunt, 59 Mo. 263; Field *v.* Tenney, 47 N. H. 513.

W. entered into a parol contract of co-partnership with defendants, but when the articles were prepared, the son of W. was, at his request, permitted to sign them upon his assurance that he was to remain the real party to the agreement, the name of the son being used only to conceal his association with the firm from public knowledge. The conditions of the parol contract were fully performed, while the son's connection with the partnership was in fact treated as a nullity: *Held*, that W. was liable as a partner. Wilson *v.* Lovelace, 49 Iowa, 558.

Mere general reputation is inadmissible to prove the existence of a partnership. Sager *v.* Tupper, 38 Mich. 258; Taylor *v.* Webster, 39 N. J. L. 102; Tomlin *v.* Goldsmith, 40 Ga. 221; Southwick *v.* McGovern, 28 Iowa, 533; Sinclair *v.* Wood, 3 Cal. 98; Brown *v.* Crandall, 11 Conn. 92; Earl *v.* Hurd, 5 Blackf. 248; Grafton Bank *v.* Moore, 13 N. H. 99; McGuire *v.* O'Hallaran, Hill & D. Supp. 85; Inglebright *v.* Hammond, 19 Ohio, 337; Scott *v.* Blood, 16 Me. 192; Halliday *v.* M'Dougal, 20 Wend. 81; Lockridge *v.* Wilson, 7 Mo. 560; Carter *v.* Douglass, 2 Ala. 499; Smith *v.* Griffith, 3 Hill, 333; Joseph *v.* Fisher, 3 Scam. 137; Carlton *v.* Ludlow Woollen Mills, 27 Vt. 496; Bowen *v.* Rutherford, 60 Ill. 41; Wilson *v.* Col-

tween the alleged partners themselves the evidence relied on, where no written agreement is forthcoming, is their conduct, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people. This can be shown by books of account, by the testimony of clerks, agents and other persons, by letters and admissions, and, in short, by any of the modes by which facts can be established. (*p*)[1]

man, 1 Cranch.C.C. 408. See, also, Campbell *v.* Hastings, 29 Ark. 512; Turner *v.* McIlhaney, 8 Cal. 575. See, however, Halliday *v.* McDougall, 22 Wend. 264.

However, in Benjamin *v.* Covert, 47 Wisc. 375, it was held, that in an action to charge two persons as partners, if plaintiff shows that a partnership existed between them at a certain time, and was known to the public at the place of business of the firm, and that no notice of dissolution was ever given, he may further show that at the time of the transaction in question, such partnership, to plaintiff's knowledge, was *generally reputed to continue*, and that the debt was contracted in the firm name, and upon the credit of the firm, though after a dissolution in fact, it being then for the jury to determine whether the retiring partner had so acted after the dissolution as to hold himself out as still a partner, and has thus rendered himself liable. So *held*, where the firm name was the same as the individual name of the person who continued the business, and where the plaintiff had never done business with the firm during its actual existence.

While evidence of a general reputation may not be admissible to prove a partnership, still it may be competent upon the issue as to whether a member of a firm is a dormant partner. Metcalf *v.* Officer, 2 Fed. Rep. 640.

The reports of a commercial agency are not admissible to prove a partnership, unless knowledge, or means of knowledge of them, is brought home to the party attempted to be charged. Campbell *v.* Hastings, 29 Ark. 512; Bonnell *v.* Chamberlain, 26 Conn. 487.

Evidence that a person was frequently seen in the counting-house of another, transacting business as principal, and that he was generally supposed, believed, and understood to be a partner in the house of such other, was *held* insufficient to prove that he was a partner with such other person. Bryden *v.* Taylor, 2 Har. & J. 396.

Evidence that it was not generally known, in the place of the partnership, that the defendant was a partner of a certain house, is admissible to the jury, where the question is, whether the plaintiff knew that the defendant was a partner, in order to make him liable. Bernard *v.* Torrance, 5 Gill & J. 383.

(*p*) As to the presumption arising from the joint retainer of solicitors, see Robinson *v.* Anderson, 20 Beav. 98, and 7 De G. Mc. & G. 239; Webster *v.* Bray, 7 Ha. 159; McGregor *v.* Bainbrigge, ib. 164. And for cases in which a partnership has been inferred from a number of circumstances, see Nerot *v.* Burnand, 4 Russ. 247, and 2 Bli. N. S. 215; Jacobsen *v.* Hennekinius, 5 Bro. P. C. 482; Nicholls *v.* Dowding, 1 Stark. 81; Peacock *v.* Peacock, 2 Camp. 45. See, as to obtaining evidence from the solicitors of the alleged partners, Williams *v.* Mudie, 1 Car. & P. 158.

[1] The books of a firm are evidence of the partnership, as between the members. Feick *v.* Barbour, 64 Pa. St. 120. See, however, Robbins *v.* Warde, 111 Mass. 244, where, however, the suit was by a creditor.

An agreement for a partnership may be evidenced by informal documents; as for example, an unsigned memorandum

Informal documents.

Where an administratrix of one estate brought a claim against another estate, and the defense gave evidence tending to show that the decedents were in partnership, and that defendant's intestate kept the accounts, a book of accounts in the latter's handwriting and containing entries purporting to have been made in the presence of the other partner, was *held* admissible as tending to prove the co-partnership and the condition of the accounts. Howard *v.* Patrick, 38 Mich. 796. See, also, Hale *v.* Brennan, 23 Cal. 511.

The books of a firm may be given in evidence to fortify or discredit a witness who swears to the partnership. Moyes *v.* Brumeaux, 3 Yeates, 30.

The existence of a partnership having been proved at a particular time, it will be presumed to continue until a dissolution is proved, and to have been on equal terms until the contrary is shown. Reybold *v.* Dodd, 1 Harr. 401; Irbey *v.* Brigham, 9 Humph. 750.

In an action upon a note, an issue arose whether a partnership existed between the defendants. Partnership articles were offered in evidence: *Held*, that they were not inadmissible, because they only showed that a partnership existed in January, 1857, when the note was made in October, 1858, as it was proper that the jury should have the articles before them, that they might decide when the partnership terminated. Pursley *v.* Ramsey, 31 Ga. 403.

Where one was a partner in a firm in 1855 and 1857, but alleged that for 1856 he was not a partner, and that his withdrawal was evidenced by a deed which was lost, and it turned out that the deed had been destroyed by himself, and he answered delusively about it, and it appeared that he had acquiesced in certain acts of his partner, treating him as a partner: *Held*, that he was to be considered as a partner for the year 1856 also. Clements *v.* Mitchell, 6 Jones' Eq. 171.

Upon the question whether the defendants are partners here, evidence that they were partners in Europe is not so entirely irrelevant that its admission vitiates the verdict. Martin *v.* Ehrenfels, 24 Ill. 187.

Evidence to show a continuance of a partnership, after it has been dissolved, with notice to the parties, must be as satisfactory as that required to show its establishment. Allcott *v.* Strong, 9 Cush. 323.

Proof that alleged partners acted as such before and after the date of a note, is proper evidence to be left to the jury in determining the fact of partnership at that time. Gilbert *v.* Whidden, 20 Me. 367.

Where it is sought to be proved in an action, that a certain partnership existed at a given time, evidence of its existence some three months after that time, is admissible in connection with other evidence, and will be considered. Fleshman *v.* Collier, 47 Ga. 253.

See, however, Ruhe *v.* Burnell, 121 Mass. 450, where it was held that on the issue whether two persons were partners at the date of an alleged sale of goods to them, evidence of writings thereafter executed between them, and of one's declaration to the other, is inadmissible.

Persons entering into an agreement in carrying on a plantation, may afterwards modify or rescind it; but a rescission or modification of it cannot be proven by loose declarations or conversations, especially when their subsequent conduct accords with their original contract. Autrey *v.* Frieze, 59 Ala. 587.

or draft agreement acted on by the partners (*q*),[1] or a series of letters. Moreover, a prospectus or advertisement issued by one person and assented to by another, is abundant evidence of a contract upon the terms contained in the prospectus or advertisement (*r*); and the contract thus established cannot be departed from by either party without the consent of the other (*s*); and any subsequent contract based upon the prospectus or advertise-
*93 ment will be construed as carrying out the *terms therein contained, unless it can be shown that those terms were intended by both parties to be varied. (*t*)

When it is sought to make a person liable as if he were a partner, evidence must be adduced of his acts, or of what has been done by other people with his knowledge or with his consent.[1] The statements and acts of his alleged co-partners

Acts of alleged co-partner.

(*q*) Baxter *v.* West, 1 Dr. & Sm. 173; Worts *v.* Pern, 3 Bro. P. C. 548 (vol. i, p. 270, in folio edit.); Williams *v.* Williams, 2 Ch. 294. See, as to mutual insurance societies, *ante*, p. 87, note *a*.

[1] A written agreement which alone would not constitute a partnership, may yet be put in evidence, together with proof that the parties have considered it to constitute one, and have acted accordingly. Williams *v.* Soutter, 7 Iowa, 435.

In a suit against four defendants as co-partners, it is the privilege and duty of the plaintiffs to establish the connection of each one of the defendants with the firm, and for this purpose an unsigned partnership agreement between the defendants, and in the handwriting of one of them, is admissible against him. Beall *v.* Poole, 27 Md. 645.

After receiving the services of one as a partner, and recognizing him as such for several years, it is too late to set up either the non-payment of his portion of the capital stock, or the non-execution of articles of partnership, as proof that no partnership existed. Campbell *v.* Whitley, 39 Ala. 172.

In an action against several as co-partners, parol evidence to show that articles of co-partnership executed by them were to go into operation only upon a contingency, was *held* inadmissible. Dix *v.* Otis, 5 Pick. 38.

The fact that C. & S. entered into a written contract with F. & P. to excavate a certain tunnel, is not conclusive evidence that S. was a member of the association known as C. & Co., who did actually prosecute the work on the tunnel; C. & Co. may have been sub-contractors under C. & S. Sargent *v.* Collins, 3 Nev. 260.

In proving articles of association, where there is no provision or condition as to the number who shall sign it to make it valid, it is sufficient to prove the signatures of those associates who are parties to the suit, against whom it is offered in evidence. Beach *v.* Vandewater, 1 Sandf. 265.

(*r*) Fox *v.* Clifton, 6 Bing. 797, 8.

(*s*) See *infra*, p. 106, *et seq.*

(*t*) *Infra*, p. 106, *et seq.*; and see Fenn's case, 4 De G. Mc. & G. 285; Mowatt *v.* Londesborough, 3 E. & B. 907, and 4 ib. 1; but see Watts *v.* Salter, 10 C. B. 477.

[1] A partnership between the defendants may be implied from circumstan-

are not evidence against him until he and they are shown to have been connected in some way with each other;[2] and it is obviously reasoning in a circle to infer a partnership from acts of theirs, unless those acts can be imputed to him for some other reason than that he and they are partners. (*u*)

ces. Kelleher *v.* Tisdale, 23 Ill. 405; Gilpin *v.* Temple, 4 Harr. 190.

Where, in an action against a partnership, the existence of the partnership may be inferred from indirect evidence, a finding of that fact will not be disturbed for want of direct evidence thereof. Henshaw *v.* Root, 60 Ind. 220.

The fact that persons conduct business jointly as co-partners, is *primâ facie* evidence of the existence of a co-partnership between them. Forbes *v.* Davison, 11 Vt. 660; Winslow *v.* Cheffelle, 1 Harp. Eq. 25; McMullan *v.* Mackenzie, 2 G. Greene, 368; Bonner *v.* Campbell, 48 Pa. St. 286.

Evidence of specific acts of intermeddling in the affairs of a firm is admissible to prove a partnership; but the general evidence that a person has intermeddled is not admissible. Lewis *v.* Post, 1 Ala. 65.

Partnership, or joint liability between two persons living together upon a farm, may be inferred from evidence that one of them has been in the habit of ordering goods for their common use, labor, and materials, for the improvement of buildings in their joint occupancy, and mechanic's work ordinarily incident to farming operations, and that the debts contracted by him have in various instances been paid by the products of the farm, in the sale of which both participated; and from the admission of one of them, that on some occasions the other had authority to act for both, although he reserved the right to disavow such acts as he might deem disadvantageous. Farr *v.* Wheeler, 20 N. H. 569.

On the trial of an action against B., upon an issue as to whether one W. and B. were partners, there was evidence that W. and B. were together, and had certain stock together; that B. carried a note to bank to be discounted, with a written request from W. that it should be done; that B. said that the money was for himself and W.; that they were buying stock together, and that the money was to be used in buying stock; that B. afterwards referred to the debt he and W. owed in bank, etc.: *Held*, that the jury were warranted in finding that a partnership existed between W. and B. Dobson *v.* Chambers, 78 N. C. 334.

In an action against a member of an unincorporated company to recover for services rendered to the company from August 10th to December 12th, 1868, there was evidence that the articles of association of the company provided that none but stockholders should be trustees; that in 1867 the defendant was chosen trustee, and subsequently acted as such; that he had said that he had an interest in the company, having subscribed for stock in the name of a firm of which he was a member, and paid an assessment on this stock; that he was "off and on" at the office of the company; that the company began business in August, 1868; that in December, 1868, the defendant said he was an

(*u*) See 1 Tay. Ev. § 535, edit. 5; Edmundson *v.* Thompson, 2 Fos. & Fin. 564, and 8 Jur. N. S. 235; Grant *v.* Jackson, Peake, 268.

[2] See Campbell *v.* Hastings, 29 Ark. 512; Gay *v.* Fretwell, 9 Wis. 186; Hudson *v.* Simon, 6 Cal. 453.

Upon this principle it has been held that the registers of ships are no evidence of ownership except as against the persons upon whose affidavit the entries in the registers were made (*x*); that entries in the office in Somerset House for licensing stage-coaches, are no evidence to prove that the persons named in the license are

officer of the company, authorized to make contracts for it; and that in November and December, 1868, he wrote one of the original subscribers of the company as to what "we" wanted to do about the affairs of the company. The defendant did not offer any testimony to explain this evidence: *Held*, that a jury would be warranted in finding that the defendant was a member of the company at the time the plaintiff's services were rendered. Taft *v.* Warde, 111 Mass. 518. See, also, Scranton *v.* Rentfrow, 29 Ga. 341.

In an action by A against B & C, as the owners, in partnership, of a race-course, for work done on the course, C denied, under oath, the partnership; and after proof of a written agreement between B & C, for the construction of the course at joint expense and profit. A offered to prove that although he was employed by B to do the work, yet that C was often present, giving orders and directions concerning it, and shared the profits of the course after it was completed: *Held*, that the proof was admissible as tending to establish the partnership, and their joint liability as partners for the work. Perry *v.* Randolph, 14 Miss. 335.

Evidence that one was often in the store conducted in the name of another; that he bought, sold and bartered goods there; inspected the books and made charges, and went to Boston and bought goods for the store,—is evidence to prove that he was a partner; he having formerly been a partner, and the old sign of the firm still remaining upon the building. State *v.* Wiggin, 20 N. H. 449.

Where a party has been a member of a defendant firm, but has erased his name from the articles, it is competent for plaintiff to show that without pretense of agency, he continued active in the business, sued out a writ in the name of all the defendants for injury to their joint property, and swore to a similar bill in chancery, and held a deed of an undivided portion of the partnership mill. Carlton *v.* Ludlow, 28 Vt. 504.

Where two persons, as intended partners, purchase a stock of goods, and agree to give their notes therefor, and on receiving the goods at the time fixed, one of them, the other being absent, signs and delivers the notes in their joint names, the notes thus given are firm notes, and the agreement and its consummation present a strong *primâ facie* case of partnership in an action against them, on a contract made by one of them with another party in the name of the firm. Drennan *v.* House, 41 Pa. St. 30.

In an action in which it was sought to charge defendants as partners owning a mill, the plaintiff introduced evidence tending to show that one of them exercised authority about the mill: *Held*, that by way of rebutting the inference that he was interested as a co-partner, it was proper to show that others gave like directions; but not to prove his statements disclaiming such interest. Sager *v.* Tupper, 38 Mich. 259.

(*x*) Tinkler *v.* Walpole, 14 East, 226; Flower *v.* Young, 3 Camp, 240, and see McIver *v.* Humble, 16 East, 174. See 14 & 15 Vict. c. 99, § 12.

the owners of the coach (*y*); and that the acts, letters, and statements of one promoter of a company are no evidence against another, who cannot be shown to have authorized them. (*z*)

It need scarcely be observed that the principle now under dis-

In an action of assumpsit against several persons as partners, a part of the defendants filed a plea denying the partnership; and on the trial the court permitted to be read in evidence a paper in the handwriting of a former clerk of the association, purporting to contain a list of stockholders in a mercantile association, in which list the names of the defendants appeared. No proof was offered that the defendants had any knowledge of such paper, or that it was in the handwriting of the clerk of the defendants: *Held*, that the paper was inadmissible in evidence. Yocum *v.* Benson, 45 Ill. 435.

In a suit against F. & S., two millers, as partners, to recover for wheat sold them, F. offered to show by sundry witnesses, who were customers at the mill, that they were in the habit of selling grain to S., but that they never knew that F. had anything to do with buying the grain, or that the partnership extended to that business: *Held*, that this evidence was inadmissible. Folk *v.* Wilson, 21 Md. 538.

Where a partnership was attempted to be proved between two persons as inkeepers, etc., by the admission of one of the alleged partners, and by the course and circumstances of their business, and their joint use of the property connected with the tavern-house: *Held*, that an assignment of the tavern furniture and accounts, by the other alleged partner to a third person, for the payment of the assignor's debts, might be given in evidence, as tending to rebut the testimony on the part of the plaintiff, and to show that the alleged partners had not been in the joint receipt of the alleged income of the tavern. Callender *v.* Sweat, 14 Vt. 160.

When it was proved that A was in a store and sold goods for cash and on credit, in order to raise the presumption that A was a partner: *Held*, that it was proper to ask witness if it is not customary for clerks to sell in this way, as well as principals. Perry *v.* Butt, 14 Ga. 699.

When a witness has stated what he has seen and heard which tended to show the existence of a partnership, he may be asked what he has seen and heard to the effect that there was no partnership, in order to prove negatively that he had no information or knowledge that there was no partnership. Conklin *v.* Barton, 43 Barb. 435.

The possession of a note by one of two joint payers is not evidence that the payers are partners, but is simply *primâ facie* evidence of the title disclosed upon the face of the note. Ryhiner *v.* Feickert, 92 Ill. 305.

Two persons signing a note jointly, is no evidence of a partnership between them. Hopkins *v.* Smith, 11 Johns. 161.

Evidence that legal services were rendered in the joint names of an attorney-at-law and another person, is not sufficient to prove a partnership between them, and thus defeat an action for such services brought by the attorney alone. Bishop *v.* Hall, 9 Gray, 430.

Evidence that a person was "inter-

(*y*) Strother *v.* Willan, 4 Camp. 24; Weaver *v.* Prentice, 1 Esp. 369.

(*z*) See Drouet *v.* Taylor, 16 C. B. 67; Burnside *v.* Dayrell, 3 Ex. 224; Watson *v.* Charlemont, 12 Q. B. 856. This will be again alluded to in a subsequent chapter.

cussion does not apply to exclude the testimony of a person deposing to the existence of a partnership between himself and another. Such testimony was not excluded even before the alteration of the law relating to the competency of witnesses (*a*), and there is on pretense for excluding such testimony now. If a partnership is alleged to exist between A. and B., and A. is called to prove it, and he denies it, then, although the person calling A. as a wit-
*94 ness cannot adduce evidence to show that his *testimony is generally unworthy of credit, yet such person may adduce other evidence to show that the partnership denied by the witness does in point of fact exist. (*b*)

Acts of co-partners after *prima facie* evidence of partnership has been given.

Further it is to be observed that, notwithstanding the principle above stated, after sufficient evidence has been given to raise a presumption that several persons are partners, then the acts of each of those persons are admissible as evidence against the others for the purpose of strengthening the *primâ facie* case already established. Thus, in Norton *v.* Seymour (*c*), in order to prove a partnership between the defendants Seymour and Ayres, the plaintiff called a witness who deposed that Ayres had in conversation admitted the partnership, and then the plaintiff gave in evidence a circular and invoice issued by Seymour, and headed Seymour and Ayres, and stating that the business would in future be carried on in those names. Ayres objected to the admissibility of this document, there being as she contended no evidence to connect her with it; but the Court held it to be admissible; for, before the document was put in, evidence of a partnership had been given, and the document tended to confirm that evidence. So in Nicholls *v.* Dowding (*d*), *primâ facie* evidence of a partnership having been given, the declarations of one of the defendants were inquired into for the purpose of binding the others, and it was held that such evidence was admissible, a foundation for it having been previously laid. (*e*)

Norton v. Seymour.

Nicholls v. Dowding.

ested " in a certain business, is not sufficient to prove a partnership. Levy *v.* McDowell, 45 Tex. 220,

In a question of partnership, evidence that the connection between alleged partners had been formed fraudulently, and for the purpose of covering the property of one from his creditors, is not admissible. Thomas *v.* Moore, 71 Pa. St. 193.

(*a*) Hall *v.* Curzon, 9 B. & C. 646; Blackett *v.* Weir, 5 ib. 385.

(*b*) Ewer *v.* Ambrose, 3 B. & Cr. 746.

(*c*) 3 C. B. 792.

(*d*) 1 Stark, 81.

(*e*) See, too, Alderson *v.* Clay, 1 Stark, 405.

A person may be made liable as if he were a partner without the proof of any partnership articles or deed which he may have executed. (*f*) And although in order to prove an actual partnership it may be necessary by the law of some other country to show that some formality has been observed, the non-observance of that formality will not prevent persons who in fact trade as partners, from being so treated in this country in questions arising between them and third parties. (*g*)

Proof of articles, &c., not necessary.

An admission made by any one that he is a member of a *particular partnership or company is evidence of that fact against him (*h*)[1];

*95 Admissions.

(*f*) Alderson *v.* Clay, 1 Stark, 405, where a person was proved to be a member of a company without the production of the company's deed.

(*g*) Shaw *v.* Harvey, Moo. & Mal. 526; Maudeslay *v.* De Blanc, 2 C. & P. 409, note.

(*h*) Sangster *v.* Mazareddo, 1 Stark. 161; Studdy *v.* Saunders, 2 D. & Ry. 347; Clay *v.* Langslow, 1 Moo. & Mal. 45.

[1] See Taylor *v.* Henderson, 17 Serg. & R. 453; Palmer *v.* Pinkham, 33 Me. 32; Thomas *v.* Wolcott, 4 McLean, 365; Fenn *v.* Timson, 4 E. D. Smith, 276; Wallace v. Berger, 14 Iowa, 183; Chaffee *v.* Rentfroe, 32 Ga. 477; Vance *v.* Funk, 2 Scam. 263; Grafton Bank *v.* Moore, 14 N. H. 142.

The separate admission or declaration of each member of an alleged partnership, is competent evidence against him to prove the partnership, but not against the other supposed members if absent at the time it was made. Currier *v.* Sillioway, 1 Allen, 19; Gordon *v.* Bankard, 37 Ill. 147; Drennen *v.* House, 41 Pa. St. 30; Cross *v.* Langley, 50 Ala. 8; Converse *v.* Shambaugh, 4 Neb. 376; Smith *v.* Collins, 115 Mass. 388; Porter *v.* Wilson, 13 Pa. St. 641; McPherson *v.* Rathbone, 7 Wend. 216; Yancey *v.* Mariott, 1 Sneed, 28; Cowan *v.* Kinney, 33 Ohio St. 422; Johnson *v.* Gallivan, 52 N. H. 143; Smith *v.* Hulett, 65 Ill. 495; Nelson *v.* Lloyd, 9 Watts, 22; Thornton *v.* Kerr, 6 Ala. 823; Teller *v.* Patten, 20 How. 125.

Before the admissions of one can be received against the other, independent proof of the partnership must be made. Cross *v.* Langley, *sup.*; Converse *v.* Shambaugh, *sup.*

Such admissions to third parties are not admissible on the issue whether the alleged partners represented themselves as partners to a person of whom they were alleged to have borrowed money as such partners. Smith *v.* Collins, *sup.* But the successive acts and declarations of each of several defendants, showing their partnership, are equivalent to a joint declaration to that effect by all, and may be given in evidence. Haughey *v.* Strickler, 2 Watts & S. 411; Welsh *v.* Speakman, 8 Id. 257.

In a suit against L. as a partner in a firm known by the name of L. & B., letters written in the name of the firm by L., and entries made by him in the books of L. & B. are *primâ facie*, admissible in evidence to charge him as partner. Lewis *v.* Post, 1 Ala. 65.

Plaintiffs advised defendants of a purchase made by one A, claiming to be a partner in their firm. Defendants answered, promising to settle plaintiff's account, saying, "we will make the arrangement," etc.; "we thought it settled before, as we sent the money by A

and such an admission renders it unnecessary for the purpose of fixing him with the liabilities of a partner, to show that he executed any document whereby he became a partner (*i*)* Thus it has several times been held that a person who has admitted himself to be a shareholder in a company constituted by deed, may be rendered liable as a shareholder without any evidence being given as to that deed. (*i*)

last winter," etc.: *Held*, that these admissions as tending to show a partnership, were sufficient to entitle the plaintiffs to recover. Cleghorn *v.* Johnson, 11 Iowa, 292.

Although the bare declaration of B & C, that A was their partner, are insufficient to charge him, their acknowledgments that articles of co-partnership existed between them and A, which they refused to produce upon the trial, after due notice, were *held* evidence from which a jury might reasonably infer that, if produced, they would have shown the fact of a partnership. Whitney *v.* Sterling, 14 Johns. 215.

An inventory filed in court by one partner after the death of the other partner, purporting to contain the assets of the partnership, is no more than an implied admission of the partnership, made after its dissolution, and is not evidence either to prove the partnership as against the decedent, or to bind the creditors of the partnership as against the individual creditors of the decedent. Bond *v.* Nave, 62 Ind. 506.

If defendants, sued as co-partners, introduce in evidence a receipt taken by them in their co-partnership name of the plaintiffs, this is an admission of the co-partnership. McFarland *v.* Lewis, 2 Scam. 344.

In an action on an account stated, evidence that the defendants admitted that they were doing business as partners should be allowed to go to the jury, even if not specifically confined to the time within which the account accrued. Sager *v.* Tupper, 38 Mich. 258.

Where it appears from the pleadings that the several defendants were jointly employed by the plaintiff, the admission of one of the defendants is competent to charge the other defendants as his co-partners, and it is immaterial whether such admission is made in a judicial proceeding or otherwise. And objection to such evidence on the ground of want of previous proof of partnership is removed by subsequent testimony tending to prove that fact. Fogerty *v.* Jordan, 2 Robt. 319.

The defendant's acknowledgment of the partnership of the plaintiffs is sufficent evidence of such partnership. Bisel *v.* Hobbs, 6 Blackf. 479.

In an action against A and B as partners, A was defaulted, and B pleaded the general issue: *Held*, that letters written by A, in the partnership name, could not be read in evidence by B, to show that he was not a partner with A, but that the letters of the plaintiff were good evidence to show that he did not consider B as a partner. Champlin *v.* Tilley, 3 Day, 303.

In determining whether a partnership as to third persons exists, all the declarations by word or act, of the supposed partners, the rights they have exercised; and every circumstance attending the transaction, may be proved by third persons, and must be considered

*See Wallace *v.* Berger, *sup.*

(*i*) Harvey *v.* K. 9 B. & C. 358; Ralph *v.* Harvey, 1 Q. B. 845; and see Tredwen *v.* Bourne, 6 M. & W. 461.

Admissions, however, are not necessarily conclusive, and little weight ought to be attached to them if it is shown that they were made under erroneous suppositions. This seems to have been the true ground of the decision in the much debated case of Vice *v.* Anson. (*k*) There the defendant supposed herself to be a shareholder in a mine; she had in private letters and in private society, written and spoken of herself as a shareholder; she had received certificates stating that her name was registered in the act-book of the mine, and that she was entitled to share the profits of it; and lastly, she had paid deposits on her shares. But Lord Tenterden held that she had not in point of fact any interest in the mine, and that as she never represented to the plaintiff that she was

Vice *v.* Anson.

in determining what is the true relation between the supposed partners. Pierson *v.* Steinmyer, 4 Rich. 309.

The acts and declarations of a person not a partner are not admissible to charge him as a partner, without showing that they were brought home to the plaintiff's knowledge. Fitch *v.* Harrington, 13 Gray, 468.

Where two persons purchased a mill and house, which they commenced to remove, but, before the removal, one of them died: *Held*, that the general declarations of the deceased that they had bought the mill in partnership, no terms of partnership being stated, did not afford satisfactory evidence of the existence of a partnership; as such declarations might well consist with there being nothing more than a tenancy in common. Gregory *v.* Martin, 78 Ill. 38.

The plaintiff sought to charge a party as a partner in running a line of stages, and gave evidence of his declaration at different periods; at the earliest admitting the partnership, and at the latter denying it. The plaintiff further offered to show that at the time of the defendant's denial, another line had been started on the same road, and that in consequence of the competition the charge for passengers had been greatly reduced: *Held*, that this latter testimony did not impair the weight of the declarations last made by the defendant, but being irrelevant, was consequently rightly rejected. Anderson *v.* Snow, 9 Ala. 247.

The testimony of a witness that he has paid notes to the firm, in which were the individual names of the members, and the declarations of the members made prior to the institution of the suit, are evidence for parties to show a partnership between them. Woods *v.* Quarles, 10 Mo. 170.

Under the plea of *non est factum*, involving the existence of a partnership, the declaration of the defendant to third persons, before the execution of the instrument in question, that no partnership existed, is not evidence. What the defendant said when the note was offered to him for payment would be evidence, such declaration being a part of the *res gestæ*. England *v.* Burt, 4 Humph. 399.

(*k*) 7 B. & C. 409, and Moo. & M. 98. See, on this case, Owen *v.* Van Uster, 10 C. B. 318, and *qu.* if it is law; for though the defendant had no legal interest in the mine, was she not entitled as a partner to share the profits obtained by working the mine? and what more was necessary to make her liable to the supplier?

a shareholder therein, she could not be made liable to him simply because of her erroneous suppositions and admissions.

The inconclusive nature of an admission was distinctly recognized in Ridgway v. Philip (*l*), where Parke, B., said: "It frequently happens in cases where the liability of persons as partners comes in question, that the juries are induced to give too much effect to slight evidence of admissions. An admission does not estop the party who makes it; he is still at liberty, as far as regards his own interest, to contradict it by evidence." *In that case one of the defendants was allowed to explain an admission made by him to the effect that he was in partnership with the others. (*m*) So where the freighters of a ship addressed a letter to the captain instructing him on his arrival at the Cape to call upon their managing partner, Mr. W. G. Anderson, it was held competent to the freighters to show that Mr. Anderson was not a partner of theirs. (*n*)

Ridgway v. Philip.

*96

Even where a person has executed a deed describing him as a partner, the admission is not necessarily conclusive against him. (*o*)

An admission by one person that he and another are partners, may be open to the explanation that they are partners to some limited extent, or with respect to some particular transaction, but not to the extent or with respect to the business necessary to sustain the case made against him. Persons may be partners in some particular concern or business, and yet not be in partnership generally so as to render them liable as partners in cases not connected with that particular business; and a person who has admitted that he and others are partners is allowed to show that he and they are not partners to the extent or for the purposes relied upon by those seeking to avail themselves of his admission. (*p*)

(*l*) 1 Cr. M. & R. 415.

(*m*) See, too, Newton *v.* Belcher, 12 Q. B. 921; Newton *v.* Liddiard, ib. 925, as to the admissions made by promoters of companies as to their liabilities.

(*n*) Brockbank *v.* Anderson, 7 Man. & Gr. 295. The real question was whether Anderson was an interested witness, which he would have been had he been a partner. See Mant *v.* Mainwaring, 8 Taunt. 139; Brown *v.* Brown, 4 ib. 752.

(*o*) See Radcliffe *v.* Rushworth, 33 Beav. 485; Emerson's case, 9 Eq. 597.

(*p*) See Ridgway *v.* Philip, 1 Cr. M. & R. 415; and De Berkom *v.* Smith, 1 Esp. 29.

Again, persons may agree that as between themselves, the partnership between them shall be deemed to have commenced at some time before its actual commencement. Proof of such an agreement as this would not enable a stranger to make the parties to it liable to him as partners for what took place before the partnership in point of fact began. As to third parties, such an agreement is *res inter alios acta*, which does not affect them in any way (*q*); and it is obvious that an admission of *the existence of a partnership might be explained as true only in this limited sense; in which case the admission might be worth nothing. *97

Retrospective articles, &c.

The following is the kind of evidence usually had recourse to for the purpose of proving the existence of an alleged partnership or *quasi*-partnership:

Unsual evidence of partnership.

Agreements in writing and deeds, showing the right to share profits.[1] If the signature to a deed is proved, its due execution is inferred (*r*). To prove who con-

(*q*) Wilsford *v.* Wood, 1 Esp. 182; Vere *v.* Ashby, 10 B. & C. 288. This subject will be more fully examined in book ii, ch. 2, § 3.

(*r*) Grellier *v.* Neale, 1 Peake, 198.

[1] A mortgage deed of a partnership relating to partnership business, executed by one of the firm, in the firm name, is evidence competent to be given to prove the existence of the partnership, though the deed was for a purpose foreign to the particular transaction or contract in the suit, where such evidence is sought to be introduced. Crowell *v.* Western Reserve Bank, 3 Ohio St. 406.

The defendant made a written lease of a stable to certain persons, described in the lease as "S. F. Ripley & Co." Previous to this, the plaintiffs, being respectively, proprietors of separate lines of stage coaches, agreed to hire and keep a stable in common, for their coach horses; they took possession of the stable, and furnished money in certain agreed proportions, to pay the rent to the defendant, and the hostler's wages. While thus in possession of the stable, they made certain repairs on it, under an agreement with the defendant that he should pay for them: *Held*, that there was competent evidence that the plaintiff's were partners under the firm name of S. F. Ripley & Co.: *Held*, also, that it was no objection to the partnership that it was limited to this single transaction; and that it was no objection to the verdict that the Court declined to instruct the jury whether the plaintiffs would be liable for the rent in case the stable should be untenantable. Ripley *v.* Colby, 23 N. H. 438.

Defendant G. and one D., in his lifetime, were equal co-partners in the hotel business, and valuable property employed therein, being also, at the death of the latter, seized and possessed of a leasehold interest in certain premises demised for hotel purposes for a definite term of years, which had not then expired. On the death of the decedent, the partnership affairs were left in an unsettled condition, with large assets and liabilities, the former of which, however, were greatly in excess of the latter. Decedent left, as next of kin, three children and his widow, Mrs. D., the other appel-

stituted a firm of A and Co., the attorney of B and Co. cannot be compelled to produce an agreement made between A and Co. and B and Co., if he objects on the ground of professional confidence. (*s*)

Admissions (*t*), as to which see *ante*, pp. 94, 95.

Advertisements, Prospectuses, &c., containing the names of the alleged partners (*u*), and names over doors (*x*) and on carts. (*y*)[a]

lant, defendants herein, who claimed an interest in such firm property. Thereupon all the defendants entered into a written agreement with each other for the purpose, as therein declared, of settling all disputes between them concerning said partnership business and property, definitely fixing their respective interests therein, and continuing said business as therein provided, and which contained mutual covenants, stipulating among other things in substance as follows: That said business should be continued to the end of the lease by said G., as surviving partner of the said D., using therein the capital and property employed by the old firm, and paying its debts; G.'s share and interest in said business and property was fixed at one undivided half part thereof, and each of the other appellant defendants at one undivided eighth part thereof. Mrs. D. was to furnish, to be invested in said business, some $14,000, to be reimbursed to her, with interest, out of the accruing profits. Each party was to share in the profits according to his interest in the business and property, as fixed by the agreement, and the same were to be divided and apportioned annually. Upon the termination of the business such property and its proceeds were to be divided in like manner. The business was to be under the management and control of said G., subject in part to the counsel and direction of Mrs. D., each of whom was to receive compensation therefor. A full inventory of all the assets and property of the business concern was to be made. New books of account were to be opened and kept, showing all the transactions in said business, and containing a stock account, and showing the amount of property invested therein, and the interests of the respective parties therein as fixed by said agreement, and these were subject to inspection at all times by any of the parties, through an agent agreed upon and designated. Provision was also made for the renewal of furniture and for repairs, and prohibiting the withdrawal of any money from the business, except to the extent, and upon the conditions therein mentioned: *Held*, 1, that the legal effect of these stipulations was to create a partnership between the defendants as to third parties dealing with them, with knowledge of the agreement, and upon the faith of its provisions.

2. That as to such parties, said defendants were estopped from denying the existence of the state of facts assumed by the agreement. Delaney *v.* Dutcher, 23 Minn. 373.

(*s*) Harris *v.* Hill, Dowl. & Ry. N. P. Ca. 17.

(*t*) Sangster *v.* Mazareddo, 1 Stark, 161; Harvey *v.* Kay, 9 B. & C. 356; Ralph *v.* Harvey, 1 Q. B. 845; Clay v. Langslow, 1 Moo. & M. 45.

(*u*) Lake *v.* Argyll, 6 Q. B. 477; Bourne *v.* Freeth, 9 B. & C. 632; Maudslay *v.* De Blanc, 2 C. & P. 409, note; Reynell *v.* Lewis, 15 M. & W. 517; Wood *v.* Argyll, 6 Man. & Gr. 928. In *Ex parte* Matthews, 3 V. & C. 125, an advertisement of dissolution was relied on.

(*x*) Williams *v.* Keats, 2 Stark. 290. See, too, Pott *v.* Eyton, 3 C. B. 32, *ante*, p. 50.

(*y*) Stables *v.* Eley, 1 C. & P. 614.

[a] An instruction to the jury that the presumption of a partnership from the

Answer in chancery containing admissions. (*z*)[3]
Bills to customers[4] } containing the names of the alleged partners. (*a*)
Circulars }
Invoices }

use of a name such as is commonly used where a partnership exists, is slight and easily rebutted, affords no ground of exception. Charman *v.* Henshaw, 15 Gray, 293.

A paragraph in a newspaper, which states that a certain person is a member of a certain partnership, but does not purport to have been inserted by the partnership, is not admissible to charge him as such, merely on proof that he was a subscriber to the paper at that time, and never requested the editor to deny any such statement. Potter *v.* Greene, 9 Gray, 309.

A and B held themselves out as partners by advertisements. A purchased of one, who supposed them to be partners, goods within the business of the pretended firm, though as matter of fact, A did not intend to bind B by the purchase: *Held*, that B was liable, unless the vendor knew that B was not concerned in the purchase. Booe *v.* Caldwell, 12 Ind. 12.

To prove a partnership, parol evidence of the contents of printed cards cannot be given unless traced to the defendants. Wilson *v.* Colman, 1 Cranch C. Ct. 408.

When in an action on a note, signed by a firm, the defense is that no such firm existed, the fact that printed hand-bills, with the name of the firm signed thereto, were posted at various places in the town where the defendant was residing, and that one of them was posted on the door of the house where he boarded, is competent evidence to be submitted to the jury in determining the fact whether or not a partnership existed. Tomlin *v.* Goldsmith, 40 Ga. 221. See, also, Barcroft *v.* Haworth, 29 Iowa, 462.

In order to prove the existence of a partnership, it is competent to show how the supposed firm made out their accounts, kept their books, and even marked boxes of merchandise; but to make such proof available, it must be shown that the party against whom it

(*z*) Studdy *v.* Saunders, 2 D. & Ry. 347; Grant *v.* Jackson, 1 Peake, 268.

[3] On the trial of an action brought against several as partners, only one of whom has been served with process, on the question who constituted the partnership, the record of a former action against the defendant served with process, in which he pleaded in abatement the non-joinder of the present defendants, is competent evidence. M'Clelland *v.* Lindsay, 1 Watts & S. 360.

[4] See McNeill *v.* Reynolds, 9 Ala. 313; Davis *v.* White, *supra* note (2).

Where a person has suffered his name to be held out to the world as a member of a mercantile firm, and permitted persons to deal on the credit of the firm, he cannot object to the admission in evidence as proof of the partnership, of books kept and accounts rendered in the name of the firm. Chidsey *v.* Porter, 21 Pa. St. 390.

The headings in a measurer's abstract book, showing that the defendant was charged for the work measured, as debtor to the plaintiff and another, are inadmissible as evidence for the defendant for the purpose of proving a technical partnership between the plaintiff and such other party, there being no offer to connect them with other evidence going to show the existence, at any time, of such partnership. Green *v.* Caulk, 16 Md. 556.

(*a*) Young *v.* Axtell, 2 H. Blacks. 242; Norton *v.* Seymour, 3 C. B. 792.

Bills of Exchange. The mode in which these have been drawn, accepted, or endorsed, has frequently been relied on with success. (*b*)[5]

Drafts of Agreements, which have been acted upon. (*c*)[6]

is offered had some agency in these acts, or impliedly or expressly sanctioned or approved them. McNeill *v.* Reynolds, 9 Ala. 313.

In assumpsit against A, B, and C, as partners under the firm of A & Co, for goods sold, the question being whether B and C were partners of A, who had purchased the goods, and B and C appearing to have had a storehouse in another town: *Held*, that a witness might be asked whether he saw boxes of goods marked A & Co. at the storehouse of B and C, the evidence having a connection, though very slight, with the matter in controversy. Chapman *v.* Wilson, 1 Rob. (Va.) 267.

In an action of replevin for goods attached under an execution against A, the defense was that the goods belonged to a firm consisting of A and the plaintiff: *Held*, that evidence that the advertisements of the store in which the goods were found, the receipts given and taken, and the bills for goods, were in the plaintiff's name alone, and that the business was conducted in his name and upon his credit, was sufficient to entitle him to recover, if there were no circumstances impeaching or rebutting the presumption arising from these facts. Davis *v.* White, 1 Houst. 228.

(*b*) Spencer *v.* Billing, 3 Camp. 310; Guidon *v.* Robson, 2 ib. 302; Duncan *v.* Hill, 2 Brod. & Bing. 682; Gurney *v.* Evans, 3 H. & N. 122.

[5] B. sold part of a coal lease with the personal property to M., who constituted O. his attorney; orders drawn for goods by B. on a firm, "B. & Co.," in favor of the plaintiffs, accepted by O., and goods furnished accordingly, were evidence of partnership between B. and M. Thomas *v.* Moore, 71 Pa. St. 193.

B. when alone kept blank assignments which were filled up by him to the plaintiff, a store-keeper, for the amount due laborers of B., and the laborers received goods to the amount from the plaintiff. There being evidence of partnership between B. and M., such assignments dated afterwards were evidence in a suit against the firm. Thomas *v.* Moore, 71 Pa. St. 193.

A person cannot be made a partner in fact or appearance, so as to bind him, unless by his consent, admissions or acts. The declarations or acts of others can have no such effect unless authorized or ratified by him. Bishop *v.* Georgeson, 60 Ill. 484.

To establish the fact of an alleged partnership, the manner in which the the books of a third person seeking to charge one as a partner, were kept, is not competent evidence. McNamara *v.* Draft, 40 Iowa, 413.

In an action against several persons, upon an account arising from stock transactions claimed by plaintiff to have been joint transactions on the part of defendants but claimed by one of the defendants to have been several: *Held*, that evidence that said defendant had a private account running at the same time, was competent as a circumstance tending to show that the other account was joint and not several. Quincey *v.* White, 63 N. Y. 370.

In an action against D. and M., where the question of their partnership was in issue: *Held*, that bills of goods made out against D. alone, and found in a drawer in the room where the business was carried on, were inadmissible on behalf of M. to prove that no co-partnership existed between them. McNamara *v.* Draft, 33 Iowa, 385.

(*c*) Worts *v.* Pern, 3 Bro. P. C. 558.

[6] In an action against P. and B. as partners, evidence was introduced to show that B. signed a contract to do

Letters and Memoranda, showing an intention to give a person a share of profits, coupled with evidence that such intention was acted on. (*d*)

Meetings. Attending and taking part in them (*e*); requiring them to be called. (*f*)[1]

work on a railroad in the name of P. and company; that a bill for work on the same road was signed by B. in the same name; that several receipts were signed by B. at about the same period in the same name; and others by P. in the same name; and that notes signed P. and company were discounted at a bank and paid; no proof being adduced that the defendants were not at one time partners in the business of railroad contracting, the evidence was *held* sufficient to establish the existence of a partnership for that purpose. Holmes *v.* Porter, 39 Me. 157.

(*d*) Heyhoe *v.* Burge, 9 C. B. 431; Baxter *v.* West, 1 Dr. & Sm. 173, where a partnership for seven years was proved by an unsigned memorandum on which the parties had acted.

(*e*) Lake *v.* Argyll, 6 Q. B. 477, and Wood *v.* Argyll, 6 Man. & Gr. 928; noticed *ante*, p. 53. See, also, Peel *v.* Thomas, 15 C. B. 714.

(*f*) Tredwen *v.* Bourne, 6 M. & W. 461.

[1] On the issue whether A and B were partners, in 1875, in an unincorporated lumber manufacturing company, established in 1865, there was evidence that the articles of association of the company required the election of a president, clerk, treasurer, and agent, the two latter being required to give bonds to the president for the faithful discharge of their duties, and to render accounts semi-annually; that the business of the company was required to be and was conducted by the treasurer and agent, who received salaries and devoted their entire time to it; that meetings of the members were to be called by written notice from the clerk; that meetings of the company were regularly called, and the records of the same kept by the clerk; that any member could sell his interest to a stranger, such sale carrying with it the right to membership and to a participation in the future profits of the business; that A was regularly admitted a member; that the treasurer, who was a member of the company, died in 1868, and a new treasurer was immediately chosen; that at a subsequent meeting, at which A was chosen clerk, it was voted that the treasurer continue the business of manufacturing and selling lumber; that A attended all subsequent meetings, and recorded other votes to hire money and carry on the business, and to empower one of the members to close up the business in the best manner for all concerned; that B soon after the death of the treasurer, purchased the interest of an original member, agreeing to assume all his liabilities; that B was subsequently present at a meeting of the company, of which he was notified by the clerk, at which it was voted to raise money to carry on the business; that B called himself a surviving partner of the deceased treasurer in an answer to a bill in equity brought by the latter's administrator against the other members and the original member whose interest he bought; that B signed a note with the other members to raise money for the business, and also signed a power of attorney, authorizing the agent to sell real estate for the benefit of the company; and that B said he would like to have the thing settled, and would pay his proportion if he could find out what it was: *Held*, that the evidence would warrant a finding that A and B were partners in the company. Machinists Natl. Bank *v.* Dean, 124 Mass. 82.

Usual evidence of partnership. *98 * *Payment of money into court.*—When in an action, against two persons as partners they pay money into court, this does not amount to an admission of the partnership alleged to exist between them; but only of a joint liability to the extent of the amount paid in. (*g*)

Recitals in agreements. (*h*)

Registers.—These do not affect a person whose name is in them unless he can be proved to have authorized the use of his name (*i*); or unless there is some statute applicable to the case. An entry in custom house books made by one of three alleged partners, to the effect that he and the other two were jointly interested in certain goods, though conclusive, as between them and the Crown, is not so as between them and other persons. (*k*)

Release executed by all the alleged partners. (*l*)

Shares.—The acceptance of Shares in a projected company is by no means conclusive, even when followed by the payment of deposits. (*m*)[1] It becomes important, however, when coupled with other facts showing an interference by the shareholder with the management of the concern. (*n*)

Verdict.—A verdict of a jury finding the existence of a partnership upon the trial of an issue directed out of Chancery, was held by Lord Kenyon conclusive evidence against the partners in a subsequent action brought against them by a creditor. (*o*)[2]

Use of property by several jointly. (*p*)

(*g*) Charles *v.* Branker, 12 M. & W. 743.

(*h*) Leiden *v.* Lawrence, 2 N. R. 283.

(*i*) Fox *v.* Clifton, 6 Bing. 776, noticed *ante*, p. 58. As to joint-stock companies, see the next chapter.

(*k*) Ellis *v.* Watson, 2 Stark. 453.

(*l*) Gibbons *v.* Wilcox, 2 Stark. 43.

(*m*) See Vice *v.* Anson, 7 B & C. 409; Bourne *v.* Freeth, 9 B. & C. 632; Fox *v.* Clifton, 6 Bing. 776; Pitchford *v.* Davis, 5 M. & W. 2. Compare Lawler *v.* Kershaw, Moo. & M. 93.

(*n*) Tredwen *v.* Bourne, 6 M. & W. 461; Peel *v.* Thomas, 15 C. B. 714; see the next chapter.

(*o*) Whately *v.* Menheim, 2 Esp. 608. *Qu.* if this can be supported? See Coll. Part. 532, quoting Mr. Starkie's comments on the case.

(*p*) Weaver *v.* Prentice, 1 Esp. 369. See as to co-owners who are not partners, *ante*, pp. 58 *et seq.*

[1] Subscribers for the capital stock of an unincorporated joint stock company, on proof of their respective payments, without objection of assessments for the shares set opposite their names, and without any showing by whom their names were subscribed, are liable as copartners for the debts of the concern. Tyrrell *v.* Washburn, 6 Allen, 466; Spear *v.* Crawford, 14 Wend. 20; Frost *v.* Walker, 60 Me. 468.

To prove a partnership, subscription to the stock of a company in the partnership name, may be given in evidence. Allen *v.* Rostain, 11 Serg. & R. 362.

[2] Where an action is brought against several persons as partners, and they omit to make any defense, and allow judgment to be taken against them by default, the record of such judgment, it has been held, is proper evidence of the existence of the partnership in another action afterwards brought against the same persons by different plaintiffs. Marks *v.* Sigler, 3 Ohio St. 358; Cragin *v.* Carleton, 21 Me. 492; Fogg *v.* Greene, 16 Me. 282; Ellis *v.* Jameson, 17 Me. 235.

See, however, Burgess *v.* Lane, 3 Me. 165, where it was held that a verdict and judgment thereon, are not admis-

Witness.—A witness may be asked not only who compose such and such a firm, but also whether named individuals do so. (*q*) To prove a partnership between A in England and B in Spain, it has been held not enough to show that A once dwelt in a town in Spain, and that B resides and carries on business there under the name of A, B and Co., and that there is no one there of the name of A. (*r*)

sible evidence of a co-partnership, even where that fact was expressly put in issue by the pleadings, unless the action in which such evidence is offered is between both the parties to the former suit. Burgess *v.* Lane, 3 Me. 165.

In an action by an attorney for professional services, evidence that the defendants were described in the writ in the former suit as partners, is not sufficient to charge them jointly in the present case, without proof that they had notice of the existence of the former suit during its pendency. Prentiss *v.* Kelley, 41 Me. 436.

In a suit against a firm on a promissory note, purporting to be signed by the firm name, a co-partner pleaded that he was not a member of the firm at the time the note bore date. *Held*, that evidence of suits and judgments, in which he was joined as a partner, by and against the co-partnership, prior to the date of the note, was inadmissible to rebut this plea. Collier *v.* Cross, 20 Ga. 1.

(*q*) Acerro *v.* Petroni, 1 Stark. 100.

(*r*) Burgue *v.* De Tastet, 3 Stark. 53.

*99 # *CHAPTER V.

OF THE FORMATION OF COMPANIES AS DISTINGUISHED FROM PARTNERSHIPS, AND OF THE EVIDENCE BY WHICH A PERSON IS PROVED TO BE A SHAREHOLDER.

SECTION I.—AS TO COMPANIES GENERALLY.

Companies as distinguished from partnerships.

A COMPANY, so far as it is only a partnership consisting of a large number of persons having a joint stock, and associated for the purpose of sharing profits, is formed in precisely the same manner as any other partnership, viz., by agreement; and after what has been stated in the preceding chapters, it is unnecessary to dwell upon the formation of those companies which, being unincorporated and subject to no statutory provisions, have nothing to distinguish them from societies the nature and formation of which have been already explained. (*a*)[1]

(*a*) The older cases on this subject must not be too much relied upon; the dictinction between contracts of partnership and agreements to become partners, not having been sufficiently attended to. See, as to this, *ante*, pp. 27-33.

[1] Although it appears that persons sued as purchasers of goods were organized as a joint-stock company, yet if they were not incorporated, they constitute a partnership, and though an extensive one, are in the main, subject to the rules and liabilities governing that relation. Manning *v.* Gasharie, 27 Ind. 399.

An unincorporated joint-stock company, formed for the purpose of dealing in lands, will be held a partnership. Clagett *v.* Kilbourne, 1 Black, 346; Kramer *v.* Arthurs, 7 Penn. St. 165.

The shareholders in a private joint-stock company are each personally liable for all the debts of the company, and cannot transfer this liability to others, except in the way pointed out in the articles of association. Robbins *v.* Butler, 24 Ill. 387.

An association was formed by an instrument subscribed and sealed by the parties to it, by which each person was to have one share for every $500 subscribed. The capital was to consist of eighty shares, transferable certificates of which were to be issued. The constitution provided for a choice of officers,

With respect, moreover, to other companies, an agreement to share profits or to take shares is more or less remotely the basis of them all. But speaking generally, a person who has agreed to take shares in a company does not become a member therein until some other formalities have been complied with; and in order to understand the law relating to the formation of companies, and the modes in which persons become shareholders therein, it is necessary to distinguish one company from another, and to attend to the peculiarities of each. Before, however, proceeding to do this, it will be convenient to prefix some general observations applicable, more or less, to *all companies, and to arrange these observations under the following heads, viz: *100

1. Agreements to take, and allotment of shares.
2. Effect of the prospectus.
3. Return of subscriptions.
4. Scrip.
5. Membership.
6. Registers of shareholders, and certificates of title to shares.

1. *Agreements to take, and allotment of shares.*

It has been already observed that partnership is not the result of an agreement which is not concluded (*b*), nor of an agreement to share profits so long as anything remains to be done before the right to share them accrues. (*c*) These two principles are of the greatest importance with reference to the formation of companies, and will be at once illustrated; but in connection with them, there is a third principle to be considered, namely, that of estoppel by conduct which, where it applies, excludes the operation of the other two. This last principle is alluded to here merely in order

and that the president and directors should "have the exclusive direction and arrangement of all the concerns of the company and treasury department:" *Held*, that thus constituted it became rather a joint stock company than a proper co-partnership. If they had been co-partners, each individual could have disposed of the whole property, incurred liabilities and made purchases. In this association, no one, nor even all the members, not being directors, could have done this, and the law applicable to partnership proper does not decide the rights of the members. Cox *v.* Bodfish, 35 Me. 306, citing Livingston *v.* Lynch, 4 Johns. Ch. 573; Irvine *v.* Forbes, 11 Barb. 588.

(*b*) *Ante*, p. 26.

(*c*) *Ante*, pp. 27-33.

that it may not be overlooked; its fuller examination is reserved until the subject of membership is discussed.

Prospectus.

One of the first steps in the formation of a company is the publication by its projectors of a prospectus, setting forth the nature and objects of the proposed company, the number and value of the shares intended to be created, and the amount of capital supposed to be required. The public is invited to subscribe to the company thus proposed to be formed: in other words, persons are invited by advertisements, circulars, etc., to enter into an agreement to take shares in a company, such as that described, when the same shall have been formed. Those who sign such an agreement become subscribers to the undertaking in the proper sense of the word. (*d*)[1]

*101 * The principle that an agreement to share profits does not create a partnership so long as anything remains to be done before the right to share them accrues, leads to the consequence that neither the projectors of, nor the subscribers to, a company in course of formation are partners (*e*); nor are they, simply by reason of their position as projectors or subscribers, liable for each other's acts as if they were partners. (*f*) The cases illustrating the propositions have been already noticed, and need not be again referred to. They show, however, the importance of distinguishing clearly a company which is formed from one which is being formed; and this is by no means always

Forming and formed companies.

(*d*) Burke *v.* Lechmere, L. R. 6 Q. B. 297; Thames Tunnel Company *v.* Sheldon, 6 B. & C. 341, decided that a person who had signed nothing, but had applied for shares and had paid a deposit on those allotted to him, was not a subscriber within the meaning of an act incorporating the subscribers to a projected company.

[1] "Whoever subscribes to an unconditional agreement to take a given number of shares, becomes thereby a stockholder, subject to the conditions named in the subscription paper and to those imposed by the charter or by the general law." Thompson's liability of stockholders, § 105; Hartford & N. H. R. R. Co. *v.* Kennedy, 12 Conn. 499; Dutchess Man'f'g Co. *v.* Davis, 14 John. 237; Burr *v.* Wilcox, 22 N. Y. 551; Beene *v.* Cahawba, etc. R. R. Co. 3 Ala. 660; Pickering *v.* Templeton, 2 Mo. App. 424; Brigham *v.* Mead, 10 Allen, 245; Upton *v.* Tribilcock, 91 U. S. 47; Conn. etc. R. R. Co. *v.* Bailey, 24 Vt. 465; Kennebec, etc. R. R. Co. *v.* Palmer, 34 Me. 366. See the subject fully considered in Thompson's Liability of Stockholders, *sup.*

The contracts of subscription and transfer of stock must be in writing: Vreeland *v.* N. J. Stone Co. 29 N. J. Eq. 191; Pittsburgh, etc. R. R. Co. *v.* Gozzam, 32 Pa. St. 348; Brouer *v.* Appleby, 1 Sandf. 170; Pittsburgh, etc. R. R. Co. *v.* Clarke, 29 Pa. St. 152.

(*e*) See *ante*, p. 31.

(*f*) *Ante*, pp. 52, 53.

an easy matter. (*g*) When indeed a company is incorporated by special act of Parliament, by charter, or by registration, the moment of its formation is coincident with the date of its incorporation, and is accurately determinable; but where a company is not incorporated it is often difficult to fix the time at which the agreement to form it became replaced by a contract of present partnership. The principles on which the difficulty has to be solved have been already explained. (*h*)

Application for shares.

An application for shares is made to the persons named by the projectors. In practice, the application is generally a printed form of request, addressed to the secretary or directors of the company, and expressing an agreement on the part of the applicant to take a certain number of shares in the company, or such smaller number as the directors may allot to him. The form is signed by the applicant, and he generally pays to the bankers of the company a small deposit on each share applied for, and obtains from the bankers a receipt for the payment. This payment is usually made before or at the time when the application is sent to the directors.

Application for shares revoked before allotment.

The application for shares, in whatever form it is made, and whether accompanied by the payment of a deposit or not, is only an offer to take the shares applied for, and may, like any * other offer, be retracted *102 before it has been accepted. (*i*) Nor is this right to revoke excluded by the insertion in the application of words to the effect that the applicant agrees to accept the shares applied for, or any less number that may be allotted to him, and consents to be registered in respect of them; for such words themselves only amount to an offer and do not constitute an agreement until the offer they express has been accepted. (*k*) But revocation after notice of acceptance has been posted is too late. (*l*)

(*g*) As to when the formation of a company can be said to have been commenced, see Baker *v.* Plaskitt, 5 C. B. 262.

(*h*) *Ante*, pp. 27 *et seq.*

(*i*) Ritso's case, 4 Ch. D. 774, where the applicant was a director; Gledhill's case, 3 De G. F. & J. 713; Ramsgate Victoria Hotel Co. *v.* Montefiore, and Same *v.* Goldsmid, L. R. 1 Ex. 109. See, also, Chapman's case, 2 Eq. 567; Hebb's case, 4 Eq. 9; Pentelow's case, 4 Ch. 178.

(*k*) See Ward's case, 10 Eq. 659, and Best's case, 2 De G. J. & Sm. 650; Chapman's case, 2 Eq. 567.

(*l*) See Harris' case, 7 Ch. 587.

If the application for shares is acceded to, a letter of allotment is usually sent to the applicant, informing him that so many shares have been allotted to him, and that a certain sum, by way of deposit on each share, must be paid to the bankers of the company.

Letter of allotment.

Stamp.

A letter of allotment requires a penny stamp. (*m*)

An allotment of shares, pursuant to an application for them, constitutes, with the application itself and notice of the allotment, an agreement binding both on the applicant and on the company.[1]

Agreement complete by allotment and notice.

But, unless under special circumstances, notice of allotment must be given to the applicant or his agent in order to bind the allottee. (*n*) Notice by post is sufficient (*o*); unless, perhaps, owing to no default on the part of the allottee (*p*), neither he nor his agent receives it. (*q*) The fact that the allottee has been registered *103 without his knowledge does not bind him. (*r*) *It is not, however, necessary to prove express formal notice of the allotment, it is sufficient to show that the allottee in fact knew of it. (*s*)

Moreover, an applicant may dispense with notice of allotment and preclude himself from objecting to its non-receipt.

Thus in Bloxam's case (*t*), a person applied verbally to the secretary of a company for shares in it, and paid the deposit. It was agreed between the applicant and the secretary

Bloxam's case.

(*m*) 33 & 34 Vict. c. 97, § 3. Formerly this was not so. See Vollans *v.* Fletcher, 1 Ex. 20; Moore *v.* Garwood, 4 ib. 681.

[1] See Thompson's Liabillty of Stockholders, § 109 *et seq.*

(*n*) Gunn's case, 3 Ch. 40; Robinson's case, 4 ib. 322; Wallis's case, ib. 324, note; Hebb's case, 4 Eq. 9; Shackleford's case, 1 Ch. 567; Ward's case, 10 Eq. 659, where the allottee had signed a blank transfer; Sahlgreen's and Carrall's case, 3 Ch. 323. See, also, Pellatt's case, 2 Ch. 528; Shackleford's case, 1 Ch. 567.

(*o*) Harris' case, 7 Ch. 587; Wall's case, 15 Eq. 18.

(*p*) Townsend's case, 13 Eq. 148.

(*q*) British and American Tel. Co. *v.* Colson, L. R. 6 Ex. 108; Reidpath's case, 11 Eq. 86. But see Harris' case, 7 Ch. 587.

(*r*) See last notes (*n*) and (*q*).

(*s*) Levita's case, 3 Ch. 36; Crawley's case, 4 ib. 322. In both of these the alottee had acted as a shareholder. See, also, Richards *v.* Home Assurance Association, L. R. 6 C. P. 591, where the allottee became manager. Compare Pellatt's case, 2 Ch. 527, where a demand for calls was held not notice.

(*t*) 33 Beav. 529, aff. on appeal, 4 De G. J. & Sm. 447. This case is regarded as having turned on its own special circumstances, and has not been followed. See the cases referred to above. See, also, as to directors, Harward's case, 13 Eq. 30; Leeke's case, 6 Ch. 469.

that if the shares were not allotted in a few days the deposit should be returned. The shares applied for were allotted within a few days, and the applicant's name was inserted in the register of allotments (*u*) in respect of them, and the company stopped business soon afterwards. He was held a contributory, although he had had no notice of the allotment, except by the non-return of his money, and although no shares had been issued to him.

So in Townsend's case (*x*), notice of allotment sent to the allottee to the address given by him was held sufficient, although, owing to the insufficiency of the address, the notice never reached him.

If no time is fixed for the acceptance of the application, and it is not accepted within a reasonable time, it will be considered as having been declined. (*y*) What is a reasonable time must depend on the circumstances of each particular case; and a *prudent applicant who does not receive an answer in what he considers reasonable time, should revoke his application. *104

Time for allotment.

The acceptance of the offer contained in an application for shares may, it is conceived, be evidenced otherwise than by an actual allotment. Sometimes the offer by the company precedes the application, so that the application is in truth an acceptance of a prior offer; and where this is the case an allotment is not necessary to complete the contract, although it may be necessary to constitute the applicant an actual shareholder. (*z*) But allotment is the ordinary evidence of acceptance; and where there has been no allotment, acceptance will not be inferred from the mere facts that the applicant paid a deposit on the shares at the time he applied for them; that he obtained a receipt for the amount of his deposit, and that the money has not been returned

Acceptance without allotment.

(*u*) The report shows that his name was not on the register of members. The Master of the Rolls held that the register of allotment was equivalent to the register. The judgment of L. J. Turner shows that the allotment concluded the contract.

(*x*) 13 Eq. 148.

(*y*) Ramsgate Hotel Co. *v.* Montefiore, and Same *v.* Goldsmid, L. R. 1 Ex 109; *Ex parte* Baily, 3 Ch. 592, and 5 Eq. 428; Carmichael's case, 17 Sim. 163; Mathew's case, 3 De G. & Sim. 234. See, too, Onion's case, 1 Sim. N. S. 394; Conway's case, 5 De G. & S. 150; Sharp and James's case, 1 De G. Mac. & G. 565; Robert's case, 1 Drew, 204.

(*z*) See Adams' case, 13 Eq. 474; where one company transferred its business to another; Bird's case, 4 De G. J. & Sm. 200.

to him (*a*); nor from the fact that as a director he ought to have had shares. (*b*)

Unconcluded agreements.

In order that an application for shares and an allotment of them may constitute a concluded agreement between the applicant and the company or its directors, it is essential that the allotment shall be in strict conformity with the application, and not depart from it in any material respect. If it does, the letter of allotment must be regarded as a new offer, which the applicant for shares is at liberty to accept or decline; and there will be no concluded agreement until the new offer has been accepted. (*c*) This has been decided where shares were applied for and those allotted were "not transferable" (*d*); so where the allotment was made subject to forfeiture on non-compliance with *105 certain conditions (*e*); so where 100 shares *were applied for and only 25 were allotted (*f*); so where 20*l.* shares were applied for and 40*l.* shares were allotted. (*g*) So where the secretary of a company wrote to a provisional committe-man to say that shares had been allotted to him, and asking whether he would accept them; and in answer, the allottee requested that the shares in question might be "reserved for him," an issue was directed to try the question whether the answer amounted to an acceptance of the offer or not. (*h*) There are several other cases illustrating the same principle, to which, however, it is unnecessary more particularly to allude. (*i*)

(*a*) Best's case, 2 De G. J. & Sm. 650. See, also, Ramsgate Victoria Hotel Co. *v.* Montefiore, and Same *v.* Goldsmid, L. R. 1 Ex. 109.

(*b*) See Chapman's case, 2 Eq. 567, Abercorn's case, 4 De G. F. & J. 78, and others of that class noticed hereafter under the head Contributories.

(*c*) See the next four notes, and compare with them Harris' case, 7 Ch. 587; Peek's case, 4 Ch. 532, where the term as to payment was held no qualification.

(*d*) Duke *v.* Andrews, 2 Ex. 290. See, too, Wontner *v.* Shairp, 4 C. B. 404; Vollans *v.* Fletcher, 1 Ex. 21, and compare Hutton *v.* Upfill, 2 H. L. C. 674.

(*e*) Jackson *v.* Turquand, L. R. 4 H. L. 305, affirming Addinell's Case, 1 Eq. 225; Oriental Inland Steam Co. *v.* Briggs, 8 Jur. N. S. 801, and 4 De G. F. & J. 191. Compare these with Barrett's Case, 2 De & Sm. 415, and 3 De G. J. & Sm. 30, where the new term was accepted by payment, and with Perrett's case, 15 Eq. 250, where repudiation came too late.

(*f*) Robert's case, 1 Drew. 204; *Re* Barber, 15 Jur. 51. The common form of application now in use, is for a certain number of shares, or such smaller number as may be allotted.

(*g*) See Gustard's case, 8 Eq. 488, where the bargain as to the 20*l.* shares was held binding, but there was no bargain for 40*l.* shares.

(*h*) Onion's case, 1 Sim. N. S. 394. See, too, Mainwaring's case, 2 De G. M. & G. 66.

(*i*) See *infra*, book iv, under the head Contributories.

Moreover, in cases of this kind, the facts that shares have been allotted to the applicant, and that he has been registered in respect of them and has applied for certificates, do not conclusively show an acceptance by him of the new terms. (*j*)

Again, if an offer is made to take shares conditionally or upon unusual terms, a clear acceptance of these conditions or terms must be proved in order to constitute a binding agreement;[1] and the mere fact that shares have been placed in the applicant's name is not sufficient to bind him. Thus, in Shackleford's case (*k*), a person applied for shares upon the terms that he should have the refusal of certain contracts and pay for the shares in goods and not in cash. There was no distinct evidence that this offer was accepted. The shares applied for were, however, in fact allotted to him and placed in his name; and although no notice of the allotment was sent to him, there was evidence to show that he was aware that shares had been given to him. It was nevertheless held that no concluded *agreement had been entered into, and that the applicant had not become a shareholder. *106

Conditional offers.

The conditions, moreover, must be assented to by those who are competent to bind the company. Therefore, where a person applied for shares upon certain terms which were assented to by the manager and two directors, when by the constitution of the company three directors were required to bind the company, it was held that there was no binding agreement, although the board of directors had delegated the allotment of shares to the manager and the two directors in question. (*l*)

It is a necessary consequence of the same principle that if the conditions are such that the company cannot lawfully assent to them there is no binding agreement. (*m*)

(*j*) Beck's case, 9 Ch. 392. See, also, Wynne's case, 8 Ch. 1002.

[1] Where it appears upon the face of the subscription that it is conditioned upon the performance of some act, the subscriber is not liable unless such condition is performed: Wear *v.* Jacksonville, etc. R. R. Co. 24 Ill. 593; Chase *v.* Sycamore, etc. R. R. Co. 38 Ill. 215; Fort Miller, etc. R. R. Co. *v.* Payne, 17 Barb. 579; Burke *v.* Smith, 16 Wall. 390; Burlington, etc. R. R. Co. *v.* Boestler, 15 Iowa, 555; Roberts *v.* Mobile, etc. R. R. Co. 32 Miss. 373; Henderson *v.* San Antonio & M. G. R. R. Co. 17 Tex. 573; Milwaukee, etc. R. R. Co. *v.* Field, 12 Wis. 340; Junction R. R. Co. *v.* Reeve, 15 Ind. 236; Penobscot, etc. R. R. Co. *v.* Dummer, 40 Me. 172; Martin *v.* Pensacola, etc. R. R. Co. 8 Fla. 370; Philadelphia, etc. R. R. Co. *v.* Hickman, 28 Pa. St. 318.

(*k*) 1 Ch. 567. See, also, Rogers' case, 3 Ch. 633.

(*l*) Howard's case, 1 Ch. 561.

(*m*) See Bank of Hindustan *v.* Alison,

An application for shares upon terms not assented to must not be confounded with an application for shares upon conditions which are assented to but are not performed. In the first case, there is no agreement at all; in the second case, there is a concluded agreement, and its effect with reference to the question whether the applicant has become a member or not, turns on other considerations, as will be seen hereafter when membership is examined.

2. *Effect of the prospectus.*

Prospectus not adhered to.

The prospectus issued to the public must, in the absence of evidence to the contrary, be regarded as the basis of the agreement which results from an application for shares by a person who has seen the prospectus, and an allotment to him. (*n*) Hence, if a person applies for shares in a company upon the faith of a prospectus issued by its promoters or directors, and he receives in answer to his application an allotment of shares in a company to which the prospectus does not apply, he is at liberty *107 to decline to accept such shares; for they are not in * truth what he asked for. Nor will even payment of a deposit by him upon the shares allotted be conclusive evidence against him of an assent by him to take the shares allotted; for he is entitled to assume that he has received what he applied for; and unless it can be shown that when he paid the deposit he did not act on that assumption, he is, notwithstanding such payment, entitled to say he has entered into no binding contract. (*o*)

Effect of paying for shares allotted when different from those asked for.

The following are the leading cases on this head.

Merionethshire Slate Company.

The prospectus of the Merionethshire Slate and Slate Slab Company stated the objects of the company to be to work a particular slate quarry in Wales. The company was formed for the purpose of working not only that quarry, but any slate quarry in Great Britain or Ireland. It was held that a person who had applied for shares on the faith of the prospectus, and had on his application agreed to execute the company's deed

L. R. 6 C. P. 54; Stace and Worth's case, 4 Ch. 682; Pellatt's case, 2 Ch. 527; Bunn's case, 2 De G. F. & J. 275.

(*n*) See Pulsford *v.* Richards, 17 Beav. 87; Jennings *v.* Broughton, ib. 234; Fox *v.* Clifton, 6 Bing. 776, *infra*. Compare Gerhard *v.* Bates, 2 E. & B. 476.

(*o*) Downes *v.* Ship, L. R. 3 H. L. 356, 358, and Blackburn's case, 3 Drew. 409, noticed *infra*.

of settlement, and had had shares allotted to him, and had paid a deposit upon their allotment, was nevertheless not bound to take such shares. He never had, in fact, agreed to take shares in such a company as was ultimately formed. (*p*)

Scottish Finance Bank.

The prospectus of the Scottish and Universal Finance Bank described the objects of the company to be general banking purposes, and the purchase, importation, and exportation of specie. The objects of the company as formed went far beyond this, and included, amongst other things, obtaining concessions for the construction of railway and other works, and the leasing or working such undertakings, and the transaction of the business of a merchant, contractor, and capitalist, as principal or agent in any part of the world. It was held, first by the V.-C. Wood, and afterwards by the Court of Appeal, that a person who applied for shares on the faith of the prospectus, and to whom shares were allotted, had not agreed to become a member in the company; he never having been aware that the company was formed for purposes so materially different from those stated in the prospectus. (*q*)

Russian Iron Company.

*The prospectus of the Russian Vyksounski Iron-works Company stated that the objects of *108 the projected company were to acquire, work, and extend certain specified iron-works in Russia. The objects of the company as formed were to acquire and work iron mines and works in Russia generally, and to work mines, build ships, forge, cast, and roll iron, to construct wrought and cast-iron work, and to manufacture all kinds of engines and engineering work. It was held, in this case also, that applicants for shares on the faith of the prospectus, and to whom shares had been allotted, but whose attention had never been drawn to the variance between the objects of the company as formed and those advertised, were at liberty to repudiate their shares on discovering the variation. (*r*)

Companies starting too soon.

Other illustrations of the same principle will be noticed hereafter when treating of contributories; and further illustrations are afforded by those cases in which the liability of subscribers to projected companies for debts contracted by

(*p*) Rye's case, 3 Jur. N. S, 460, V. C. S.

(*q*) Ship's case, 2 De G. J. & Sm. 544, and Downes *v.* Ship, L. R. 3 H. L. 343.

(*r*) Stewart's case, 1 Ch. 574; Webster's case, 2 Eq. 741.

the directors has been discussed. These cases established that persons who agree to become partners in a company to be formed upon certain terms and for certain purposes are not liable for debts contracted by the directors before the company is formed as contemplated; unless the subscribers have rendered themselves liable to such debts otherwise than by their agreement to take shares.

Fox v. Clifton.

Thus in Fox *v.* Clifton (*s*), it was held that the defendants, who had applied for shares in a company, had had them allotted, and had paid a deposit in respect of them, were not partners with the projectors of the company, inasmuch as the company in which alone the defendants had agreed to become partners, was never in fact formed. The capital was never subscribed, the shares were not nearly all ever taken up, the deed was only signed by a comparatively few persons, and by one only of the defendants. The time fixed for its execution had elapsed, *109 and it was expressly declared in the prospectus of *the company, and which prospectus was held to form the basis of the contract into which the defendants had entered, that every person who should neglect to execute the deed within the time fixed should forfeit all share and interest in the company. In answer to the argument that the defendants had become shareholders in a *de facto* existing company by payment of the deposits, it was observed by the Court:—"The paying of the deposits must undoubtedly be taken to imply an assent to the terms of the advertisement; that is, an assent to become partners in a company raising a capital of 600,000*l.* consisting of 12,000 shares, and to be governed by a deed which should contain the clauses and conditions to be agreed on in future; but we think it implies nothing more, and that it cannot be construed as an assent to the terms of a partnership already formed. When, therefore, instead of an allotment of 12,000 shares, the utmost that were ever alloted scarcely exceeded 7,500; when, out of that number, no more than 2,300 ever paid the first installment; when not half the latter number paid the second installment, and only sixty-

Effect of paying deposit.

(*s*) 6 Bing. 776. See, also, Bourne *v.* Freeth, 9 B. & C. 632; Pitchford *v.* Davis, 5 M. & W. 2; Vice *v.* Anson, 7 B. & C. 409. Perring *v.* Hone, 4 Bing. 28, so far as it decided that persons become partners by subscribing to an inchoate company, must be regarded as overruled by Fox *v.* Clifton.

five subscribers signed the deed; we think the subscribers were at liberty to say: This was not the trading company upon which we paid our deposit; neither the capital nor the number of shares bearing any reasonable proportion to the original plan and project. And this the more especially, because, by the terms of the advertisement, they were taught to expect that the utmost risk which they encountered was the loss of all share and interest 'in the concern' upon their refusal to execute the deed; which loss they appear to have submitted to."

Change of scheme authorized or ratified

The foregoing cases must be carefully distinguished from those in which the applicant has authorized or sanctioned an allotment of shares to him, with notice of a difference between the objects of the company as described in its prospectus and its objects as ultimately fixed by the instrument creating the company.

Change of scheme authorized by special agreement.

Where there is a special agreement to take shares, and the company as described in the agreement differs in character or purpose from that described in the prospectus, the agreement must, in the absence of fraud, be regarded as expressing the *contract into which the parties have entered; and to the extent to which the agreement and prospectus differ from each other the terms of the prospectus must be considered as excluded by those of the agreement. (*t*) *110

Change of scheme authorized by form of application.

Persons who subscribe to projected companies which are to be incorporated by act of Parliament or by charter, frequently give the managers very extensive powers, and bind themselves to take shares in almost any company which the managers may be able to induce the legislature or the Crown to incorporate, and which is not altogether of a different nature from that proposed. When this is the case, and a company is formed, the subscribers will be bound to take shares, and will be converted into shareholders, if the act or charter so declares, although the company actually formed differs both in object and constitution from that to which they subscribed. (*u*)

Midland, &c., Rail. Co. v. Gordon.

In The Midland Great Western Railway Company *v.* Gordon (*u*), a prospectus was issued for the formation of a company to construct a railway from Dublin to Mullingar and thence to Athlone. The directors were authorized to apply to Par-

(*t*) London and Continental Assurance Soc. *v.* Redgrave, 4 C. B. N. S. 524, and the next note.

(*u*) 16 M & W. 804.

liament for an act, and to do all that was necessary for forming a railway as proposed. Scrip certificates for shares were issued, and the defendant subscribed for ten shares. The directors obtained an act incorporating the company, authorizing it to make a railway from Dublin to Mullingar only, and to purchase a canal existing between Mulingar and Athlone, and to work such canal. The act provided that every one who should have subscribed to the undertaking or should be otherwise entitled to a share, and whose name should be entered on the register, should be a shareholder. The defendant had sold his scrip, but he was nevertheless registered by the company as a shareholder, and he was held to be a shareholder notwithstanding his contention that the company actually formed was materially different from that to which he had subscribed. (*x*)

Again, where a banking company was projected with a capital of 1,000,000*l.* to be trebled if necessary, and the *subscribers signed an agreement reciting that application had been made to the Crown for a charter, and nominating certain persons with power to arrange the terms of the charter in such manner as they should think necessary, in compliance with the requisitions of the Crown, and to narrow or extend the objects of the company as might be necessary, it was held that a charter incorporating the subscribers with a capital of 644,000*l.* with power to increase it to 1,000,000*l.*, with the consent of the Lords of the Treasury, was one which the directors had authority to accept, and that the subscribers were bound by it. (*y*)

Norman v. Mitchell. *111

Even where the subscriber's agreement is less general in its language, the terms of the act of Parliament incorporating the company may be such as to convert the subscribers to a company of a particular description into shareholders in another company materially different from it. A construction of the act leading to such a result is to be avoided if possible; but if its language is clear and precise, no court can lawfully decline to give effect to it, nor hold that a person expressly made a shareholder by the legislature, is not a shareholder to all intents and purposes. (*z*) When two companies are amalgamated by

Change of scheme authorized by act of Parliament.

(*x*) Nixon *v.* Brownlow, 2 H. & N. 455, and 3 ib. 686, and Cork and Youghal Rail. Co. *v.* Paterson, 18 C. B. 414, are similar cases.

(*y*) See Norman *v.* Mitchell, 5 De G. M. & G. 648; and 19 Beav. 278.

(*z*) See Kidwelley Canal Co. *v.* Raby, 2 Price, 93; Cromford and High Peak Co. *v.* Lacey, 3 Y. & J. 80; Scott *v.* Berkeley, 3 C. B. 925.

an act of Parliament which enacts that the shareholders of the old companies shall be entitled to shares in the new company, nothing more is required to make them members thereof. (*a*)

A person who has applied for shares and has had them allotted to him under circumstances which entitle him to reject them, may nevertheless elect to retain them; and this election may be evidenced not only by an express agreement but by conduct. It need hardly be added that, if a person knowing the circumstances which entitle him to reject shares which have been allotted to him, retains them without objection, and acts as if he were a shareholder, it will be too late for him afterwards to repudiate them upon the ground that they were * not what he applied for, or upon the ground that the terms of the company's prospectus have not been adhered to. (*b*) *112

Change of scheme subsequently assented to.

But although a person may acquiesce in a change in the objects of a company, yet, where those objects are changed after an application for shares and before the allotment of them, and the attention of the applicant is not drawn to the change, and he is really ignorant of it, the mere fact that he receives the shares and pays the deposit on them will not preclude him from denying that he ever agreed to take them. (*c*)

Allotment with alleged notice of change in scheme.

The same principle applies to registered companies; and it has been decided that the mere circumstance that the applicant receives a letter of allotment or certificate stating that the shares are to be held subject to the company's memorandum and articles of association, is not enough to call his attention to a material difference between the prospectus on the faith of which he applied for shares, and the memorandum of association which fixes the objects of the company. (*d*)

(*a*) Spackman *v.* Lattimore, 3 Giff. 16; and see Cork and Youghal Rail. Co. *v.* Paterson, 18 C. B. 414.

(*b*) See Tredwen *v.* Bourne, 6 M. & W. 461; Peel *v.* Thomas, 15 C. B. 714; Steigenberger *v.* Carr, 3 Man. & Gr. 191; London and Continental Assurance Co. *v.* Redgrave, 4 C. B. N. S. 524. Compare these cases with those on p. 108, note. (*s*)

(*c*) Blackburn's case, 3 Drew. 409 This case was reversed on appeal (8 De G. Mac. & G. 177); but the principle on which it was decided by the Vice-Chancellor remains unimpeached. On the appeal, additional evidence was adduced and the Court was satisfied that when Blackburn paid his deposit he must have known what shares he was taking.

(*d*) Webster's case, 2 Eq. 741; Ship's case, 2 De G. J. & Sm. 544. See, also, Beck's case, 9 Ch. 392, where the allottee was registered.

But the strong tendency of modern decisions is that as regards companies formed under the Companies Act, 1862, an allottee of shares is bound to inform himself of the contents of the memorandum of association within a reasonable time, and that if he keeps the shares allotted to him without taking the trouble to ascertain whether there is any decrepancy between the prospectus and the memorandum of association, he cannot afterwards repudiate the shares. (*e*) In the application, however, of this rule, it is important to distinguish cases in which the allottee repudiates his shares before the company is being *113 *wound up from those in which he does not. Much more is necessary to deprive a person of his right of repudiation where the company is still going, than is required to preclude repudiation after its winding-up has commenced. (*f*) The following cases, which arose before any winding-up had commenced, may be usefully referred to on this head.

Delay in repudiation.

In Stewart's case (*g*) the application to be removed from the list was successful although twelve months had elapsed since the allotment of shares, and the allottee had in the interval tried to sell them, and had attended a meeting called for the express object of altering a clause in the articles relating to the increase of capital beyond the amount stated in the prospectus; but both the V.-C. Wood and the Court of Appeal held that these circumstances did not preclude the shareholder from having his name removed, it being clearly proved that he, in fact, knew nothing of the great change which had been made in the objects of the company. (*h*)

Repudiation in time. Stewart's case.

In Webster's case (*i*), which was another in the same company, the allottee had exchanged the banker's receipt for a certificate that he was the proprietor of fifteen shares "subject to the provisions of the memorandum and articles of association;" but even this and the lapse of one year after the allotment, and ten months after the receipt, were held not to deprive him of his right to be removed.

Webster's case.

(*e*) See the judgments in Peel's case, 3 Ch. 674; Lawrence's case and Kincaid's case, 2 ib. 412; Wilkinson's case, ib. 536; also in Downs *v.* Ship, L. R. 3 H. L. 343, and Oakes *v.* Turquand, 2 ib. 325.

(*f*) Compare with the cases referred to in the next notes, Peel's case, 2 Ch. 674; Hare's case, 4 Ch. 503.

(*g*) 1 Ch. 574, *ante*, 108. See, also, Wynne's case, 8 Ch. 1002, and Beck's case, 9 ib. 392.

(*h*) Compare Brigg's case, 1 Eq. 483.

(*i*) 2 Eq. 741.

Nichols' case. (*k*) A prospectus of a projected company stated (in effect) that its objects were to rear poultry, and to enable consumers to buy eggs and poultry at half the usual price. The prospectus stated that the articles of association might be seen at the company's office; but neither the prospectus nor the articles referred to the memorandum of association. On the faith of this prospectus, application was made by Nichols for shares, and they were allotted to him. Shortly afterwards the company was registered, and by its memorandum of association its objects were stated, to be not only to rear poultry and deal in poultry and eggs, but also "the dealing in game and wild birds, the cultivation and growth of vegetables, fruit, and agricultural produce, the acquisition, use, or sale of inventions for artificial hatching, the preservation of poultry or meat, and any other purpose connected with the business of the company, and the carrying on the business of poulterers, egg merchants, dealers, market gardeners, and farmers." Nichols took no part in the proceedings of the company, and did nothing whatever except pay for the shares on allotment. A year after the allotment he, for the first time, became acquainted with the objects of the company as formed, and he at once repudiated his shares. The V.-C. Wood removed his name from the register of shareholders, being of the opinion that there was nothing to put Nichols on inquiry, and that under those circumstances the time which had elapsed since the allotment of shares was immaterial.

Nichols' case. *114

In Baily's case (*l*), a person applied for shares, and paid the deposit on them; the company was afterwards registered, and it issued another prospectus, materially differing from the first; the shares were then allotted, but this was some months after the application for them; the allottee declined to accept them, and asked for his money back; nothing further was done for eighteen months, when a call was made upon him; he then applied to have his name struck off the register of shareholders, and it was ordered to be struck off. This case is instructive, not only on the effect of delay after repudiation (*m*), but as showing, that even although the memorandum of association and the prospectus may not vary, still a material departure by the company from the

Baily's case.

(*k*) 2 W. N. 77.

(*l*) *Ex parte* Baily, 3 Ch. 592, and 5 Eq. 428.

(*m*) Compare Hare's case, 4 Ch. 503, where the company was being wound up.

prospectus on the faith of which the shares are applied for, entitles the applicant to decline to accept them.

Repudiation too late.

On the other hand, where a person knowing the change of the objects of the company delays to repudiate his shares, he will be treated as electing to hold them, and any subsequent attempt to repudiate them will be unsuccessful; and a delay of four months has been held fatal, even although during *115 that *time the shareholder had done nothing which was inconsistent with his repudiation. (*n*) It need hardly be observed, that if after knowledge of the facts entitling a person to repudiate his shares he acts as a shareholder, *e. g.*, by attending meetings, paying calls, or attempting to sell his shares, his right to repudiate them will be at an end. (*o*) Further, if a shareholder knowing of one ground of variance, or having his suspicions aroused, chooses to remain quiet, it will be too late for him afterwards to repudiate his shares, and he will be a contributory. (*p*) So will delay be fatal after the right of the shareholder to repudiate his shares is denied. (*q*)

Application for shares after a company is formed.

In all the foregoing cases it will have been observed that the application for shares preceded the formation of the company. Where a company is actually formed, and a person afterwards applies for shares in it, and they are allotted to him, an agreement between him and the company is thereby concluded, and in the absence of fraud is binding on both parties. In such a case a definite thing is applied for, *viz.*, a share in an existing company, the objects of which are defined by the memorandum of association, with which he is bound to be acquainted; the thing applied for is acquired; the contract, therefore, is complete and can only be impeached, if at all, for fraud. (*r*)

Fraudulent prospectus[1]

In order the more effectually to protect shareholders from frauds on the part of the promoters of companies,

(*n*) Lawrence's case, 2 Ch. 412; Kincaid's case, ib. See, also, Wilkinson's case, 2 Ch. 536.

(*o*) See Brigg's case, 1 Eq. 483.

(*p*) Whitehouse's case, 3 Eq. 790.

(*q*) Taite's case, 3 Eq. 795.

(*r*) See Lord Cairn's judgment in Peel's case, 2 Ch. 684, and the judgments in Kisch *v.* Central Railway of Venezuela, 3 De G. J. & S. 122, and L. R. 2 H. L. 99; Oakes *v.* Turquand, ib. 325; and see, as to the immateriality of altering the articles of association, Lyon's case, 35 Beav. 646.

[1] See Cooley on Torts, 494; Terwilligar *v.* Telegraph Co. 59 Ill. 249; Booth *ads.* Wonderley, 36 N. J. Law, 250; Paddock *v.* Fletcher, 42 Vt. 389.

every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, is required to specify the dates and names of the parties to any contract entered into by the company or the directors, promoters, or trustees thereof before the issue of such prospectus or notice (*s*). The statute which renders this necessary has given rise to much discussion and no little difference of *opinion; but as the authorities at present stand it may be taken: 30 & 31 Vict. c. 131, § 38. *116

1. That the enactment is not confined to contracts to be performed by the company, but extends to all contracts entered into by the persons mentioned, and directly or indirectly affecting the management, capital, or other property of the company (*t*); but not, it seems, to contracts by which the promoters themselves acquire property which they afterwards sell to the company if such contracts in no way affect the company itself. (*u*)

2. That the words promoter, director, or trustee, include persons engaged in forming the company, or engaged in inducing the public to take shares in it when formed (*x*); but not persons who are not so engaged when the contract with them is entered into, even although they afterwards become directors. (*y*)

3. That a person who takes shares on the faith of a prospectus, not complying with the enactment in question, is not entitled, simply on that ground, to rescind his contract to take the shares (*z*); but is only entitled to maintain an action for damages against the promoters, directors, or trustees who knowingly issued the prospectus. (*a*)

Although there may be no variance between a company's objects as set forth in its prospectus, and its objects as finally settled, and although there may be no such failure to comply with the above statute as to entitle a shareholder to maintain an action based on its provisions, yet a prospectus may contain such false and fraudulent statements as to entitle persons Fraud apart from statute.

(*s*) 30 & 31 Vict. c. 131, § 38.

(*t*) Twycross *v.* Grant, 2 C. P. D. 469, now under appeal to the House of Lords; Cornell *v.* Hay, L. R. 8 C. P. 328.

(*u*) Craig *v.* Phillips, 3 Ch. D. 722; Gover's case, ib. 182, and 20 Eq. 114. See the observations of L. J. James on this last case, 5 Ch. D. 118.

(*x*) Twycross *v.* Grant, 2 C. P. D. 469.

(*y*) Gover's case, 1 Ch. D. 182, and 20 Eq. 114. *Sed quære;* see 5 Ch. D. 118.

(*z*) *Ib.*

(*a*) *Ibid.*, and Twycross *v.* Grant, *ubi sup.*

taking shares on the faith of it to repudiate them on the discovery of the fraud. The examination, however, of this difficult branch of partnership law is postponed until a later period, as it cannot be satisfactorily pursued until various other matters have been discussed. (*b*)

*117 *3. *Of the return of subscriptions to companies.*

Before leaving the subject discussed in the foregoing pages, it will be convenient to consider the circumstances under which an allottee of shares, who has paid a deposit[1] upon them, has a right to have this deposit returned, upon the ground that the cosideration for its payment has failed.

Subscriber to a scheme not at liberty to retire from it.

It has been decided by the House of Lords, that if a number of persons, meaning to join in a common undertaking, raise a common fund, eventually to be increased, but commencing by a deposit, and they put these deposits for a common object into the hands of a committee, with directions to them to do certain acts, it is not competent for any one or more of the subscribers, against the will of the others, to withdraw and say: "I think, or we think, you ought not to go any further." Any one subscriber who is not of that opinion has a right to say: "I gave my money upon the faith that we all embarked in one common undertaking, and till that has been done, which we agreed should be done, none have a right to withdraw and say you shall not go any further." (*c*) It follows from this, that no subscriber to a projected company can recover back his money on the ground that the consideration for his subscription has failed, until the formation of the company upon the terms assented to by him (*d*) has been abandoned or has become impracticable.

(*b*) See book iii. ch., 10, § 3.

[1] The payment of a deposit is not in this country regarded as necessary in order to constitute a person a subscriber. See Thompson's Liability of Stockholders, § 107, and cases there cited.

(*c*) Baird *v.* Ross, 2 Macqueen, 61. See, too, Burnes *v.* Pennell, 2 H. L. C. 497; compare Kent *v.* Jackson, 14 Beav. 367, and 2 De G. Mac. and G. 49. As to the right of scrip holders to have the money subscribed by them applied to the purposes for which they subscribed it, see Bagshaw *v.* The Eastern Union Rail. Co. 7 Hare, 114, and 2 Mac. & G. 389.

(*d*) See Johnson *v.* Goslett, 18 C. B. 728, and 3 C. B. N. S. 569.

But further, when a person applies for shares and has them allotted to him, a contract is entered into between him and others, and before any question as to failure of consideration can be discussed, the terms of this contract must be examined for the purpose of ascertaining precisely for what the deposit was paid. (*e*) If the contract shows that the deposit was paid *for a share in a company to be formed for certain purposes and upon certain conditions, and no such company is formed, and the time for its formation (which, if no time is limited, must be taken to be a reasonable time) has elapsed, then the consideration for which the deposit was paid has failed, and the deposit is returnable, unless the original contract has been varied with the consent of the subscriber of the deposit. But if the contract shows that the deposit was made for some other purpose (*e. g.* for the purpose of being employed in attempting to start the company), then the circumstance that the company has not been and cannot be formed, is no reason why the deposit should be returned.

Unless it has failed.

*118

The leading case in support of the first of these propositions is Nockels *v.* Crosby. (*f*) There the defendants, in circulars published by them, had proposed to receive subscriptions of 10*s.* a week for the space of one year, and to invest these subscriptions and to divide the interest twice a year equally amongst the subscribers or the survivors of them. The plaintiff subscribed to this scheme, but there not being a sufficient number of other subscribers nothing was ever invested, and the defendants came to a resolution to proceed with it no further, and to return to each subscriber the amount of his subscription, less a percentage for expenses incurred. The plaintiff demanded to have the whole amount subscribed by him returned, and he brought an action against the defendants for its recovery and was held entitled to a verdict. He had subscribed his money for one purpose only; it had not been applied, nor was there any longer any intention to apply it for that purpose, and it was therefore the duty of the defendants to return it to him in full. The judgment of Littledale, J., upon the right

1. Subscribers to abortive companies not liable for expenses incurred in attempting to form them.

Nockels *v.* Crosby.

(*e*) Hence in an action for the recovery back of the deposit, the letter allotting the shares in respect of which the deposit was paid, must be produced, Clarke *v.* Chaplin, 1 Ex. 26. The defendants will, if necessary, be ordered to produce the agreement between them and the plaintiff. Steadman *v.* Arden, 15 M. & W. 587.

(*f*) 3 B. & C. 814.

of promoters of abortive schemes to charge the subscribers with expenses is particularly valuable, and was as follows:—"I also am of opinion that the plaintiff is entitled to recover, upon this general principle, that if persons set a scheme afoot, and assume to be *119 the directors or managers, all the expenses *incurred before the scheme is in actual operation, must in the first instance be borne by them. When it is in operation, the expenses and charge of management should be borne by the concern, and then it may be fair that the preliminary expenses should be paid in the same way, for then the subscribers have the benefit of them. The prospectus put forth by these defendants stated that the money subscribed was to be placed out at interest. The plaintiff's sole object in paying the money must have been to have it so placed out, but during eighteen months it remained idle at the Bankers'. Suppose there had been no subscribers, the projectors must have paid all the expenses. If, then, one person only subscribes, are all those expenses to be cast upon him? The hardship and injustice would be monstrous, yet that would be the consequence in such a case were we now to hold that the plaintiff was liable to a proportion of the expenses incurred by these defendants. With respect to the supposed partnership, it is plain that there could be none until the money was laid out in execution of the proposed scheme. I am, therefore, clearly of opinion that the plaintiff was entitled to recover."

This case has been constantly recognized and followed. (*g*) The principle applies, whatever the object of the company when established may be; and to companies formed on the cost-book system as well as to the others. (*h*) Moreover, if an allottee of shares undertakes to sign some deed which is referred to, and that deed is not in existence; but a deed, said to be the one referred to, is afterwards prepared, he is not bound to execute that, if it is inconsistent with the contract into which he has already entered. Consequently, where a person applied for shares in a pro-

Other cases.

(*g*) See Walstab *v.* Spottiswoode, 15 M. & W. 501; Moore *v.* Garwood, 4 Ex. 681; Ashpitel *v.* Sercombe, 5 Ex. 147; Coupland *v.* Challis, 2 Ex. 682; Owen *v.* Challis, 6 C. B. 115; Ward *v.* Londesborough, 12 C. B. 252; Mowatt *v.* Londesborough, 3 E. & B. 307, and 4 ib. 1.

(*h*) Johnson *v.* Goslett, 18 C. B. 728, and 3 C. B. N. S. 569. In this case the company was actually at work, and its formation had never been abandoned. But its formation, on the terms originally agreed upon was abandoned, and the plaintiff had not assented to any others.

jected railway and paid his deposits, and undertook to sign the parliamentary contract and subscribers' agreement, and a deed was afterwards prepared * authorizing the promoters *120 of the company to apply the deposits in defraying preliminary expenses, it was held, that this was not such a deed as it was obligatory upon the allottee to execute, and that, the company having proved abortive, he was entitled to recover his deposits, although it wou'd have been otherwise had he executed the deed. (*i*)

Calls on subscribers to abortive companies.

It need hardly be observed that, if a person has agreed to pay a deposit in respect of certain shares, and the consideration for his agreement has failed, he is not compellable to pay the deposit. (*k*) But if a person undertakes to pay deposits by a certain day, it is no defense to an action for not paying them on or before that day, that since that day the projected company has become abortive; for, perhaps, that would not have been its fate if the subscriptions had been paid as promised, and *ex hypothesi*, the promise was broken before the circumstances relied on as an excuse for its breach occurred. (*l*)

2. Deposits not returnable when paid to cover preliminary expenses.

In the cases referred to above, the deposits were held returnable upon the ground that they had been paid for one purpose only, and that such purpose had become unattainable. In those about to be referred to, the deposits were held not returnable, although the company subscribed to had proved abortive; for the contract of the parties showed that the deposits were properly applicable in discharge of the expenses incidental to the attempt to form the company. (*m*)

Garwood v. Ede.

Garwood *v.* Ede (*n*) is a case of this description. There the plaintiff had paid deposits on shares in a projected railway, and had signed a deed which authorized the promoters to defray the expenses incidental to the undertaking out of the deposits paid for shares. (*o*) Under these circumstances it was held *that although the scheme for the railway proved abor- *121 tive, the deposits paid by the subscribers for shares in it were not returnable.

(*i*) Ashpitel *v.* Sercombe, 5 Ex. 147.

(*k*) Duke *v.* Andrews, 2 Ex. 290.

(*l*) Duke *v.* Dive, 1 Ex. 36; Duke *v.* Forbes, ib. 356; Aldham *v.* Brown, 7 E. & B. 164, and on appeal, 2 E. & E. 398; see Woolmer *v.* Toby, 10 Q. B. 691, as to who ought to sue in such cases.

(*m*) See Baird *v.* Ross, 2 M'Queen, 68, 69

(*n*) 1 Ex. 264; see, too, Watts *v.* Salter, 10 C. B. 477; Vane *v.* Cobbold, 1 Ex. 798; Atkinson *v.* Pocock, ib. 796.

(*o*) Meaning the preliminary expenses. See Willey *v.* Parratt, 3 Ex. 211; Baird *v.* Ross, 2 M'Qu. 69.

Clements v. Todd.

Clements v. Todd (p) was decided on the same principle; for although the plaintiff had not signed any such deed as that signed in the last case, there was a deed which he had undertaken to sign, and he had accepted scrip certificates which stated that he had signed it. He was therefore held to have authorized the application of his deposits in the discharge of preliminary expenses, as mentioned in the deed.

Jones v. Harrison.

Jones v. Harrison (q) is another instance of the same kind, only the authority to defray preliminary expenses out of the deposits was conferred by the terms of the letter of allotment, and not by any deed intended for execution after the allotment was made.

Aldham v. Brown.

Upon precisely the same principle it was held in the more recent case of Aldham v. Brown (r), that where a person had covenanted to pay a deposit which was to be applicable, amongst other things, to the discharge of the expenses of forming a company, he was bound by his covenant, and was liable to an action upon it, although, before the action was brought, the formation of the company had become impossible.

Cases in which deposits have been held returnable, although the company's deed has been signed.

The cases of Garwood v. Ede (s) and Watts v. Salter (t), which decided that a person who had paid deposits and executed a deed authorizing their application in payment of preliminary expenses, could not recover the deposits so paid, are not to be regarded as authorities for the proposition that the execution of such a deed necessarily, and under all circumstances, precludes the recovery back of the deposits. If the execution of the deed has been induced by fraud, the right to recover the deposits is unaffected by such execution (u); *122 and *although it was said in Watts v. Salter that in the absence of fraud, the deed, and that alone, regulated the rights of the contracting parties, yet this doctrine has not altogether met with approbation; and in a later case, where the promoters of a railway company had in their circulars and letters of allot-

(p) 1 Ex. 286; compare Asphitel v. Sercombe, 5 Ex. 147; Sibson v. Edgworth, 2 De G. & Sm. 73.

(q) 2 Ex. 52; see, too, Willey v. Parratt, 3 Ex. 211; Baird v. Ross, 2 M'Queen, 61.

(r) 7 E. & B. 164, and 2 E. & E. 398; See, too, Duke v. Dive, 1 Ex. 36; Duke v. Forbes, ib. 356.

(s) 1 Ex. 264.

(t) 10 C. B. 477.

(u) Wontner v. Shairp, 4 C. B. 404; Jarrett v. Kennedy, 6 C. B. 319; compare Vane v. Cobbold, 1 Ex. 798; and Atkinson v. Pocock, ib. 796; Watts v. Salter, 10 C. B. 477.

ment expressly undertaken to return the deposits in full, if the necessary act of Parliament could not be obtained, it was held, first by the Court of Queen's Bench, and afterwards by the Exchequer Chamber, that the deposits paid were recoverable in full, even by persons who had executed a deed whereby it was expressly stipulated that the promoters should be indemified out of the funds of the company and by the subscribing shareholders against all expenses (*x*). The promoters, in order to induce persons to take shares, to pay deposits, and execute the deed, promised to return all deposits in full in a given event; and it could never have been intended that a person by executing the deed should lose the benefit of that promise.

Before leaving this subject, it may be as well to observe that in order that an action for the recovery back of deposits may be successful, the plaintiff must prove that the money he seeks to recover was paid to the defendants or to their agents. For, in the absence of such proof, however clear the right of the plaintiff may be to have his money back, he will have established no case against the individuals from whom he seeks to recover it.

Evidences in actions for the recovery back of deposits.

In Nockles *v.* Crosby, Walstab *v.* Spottiswoode, and the cases of that class already referred to, the plaintiff proved that he had paid his deposits to the bankers appointed by the defendants to receive them, and this was quite sufficient (*y*). But it must be borne in mind that the promoters of companies are not partners (*z*), and that in order that any particular promoter may be liable to return deposits paid into a bank to the account of the company, it must be shown that he authorized the bank to receive the deposits on the account to which they have been paid.

Evidence of the receipt of the money by the defendants.

*Thus in Watson *v.* the Earl of Charlemont (*a*), the plaintiff brought an action against three persons to recover deposits paid by him for shares in an abortive company. The three defendants were members of the committee of management. The letter of allotment sent to the plaintiff was *123

Watson *v.* Charlemont.

(*x*) Mowatt *v.* Lord Londesborough, 3 E. & B. 307, and 4 ib. 1. In this case interest on the deposit had been demanded, and was recovered, from the time of the demand.

(*y*) See, too, Hayes *v.* Stirling, 14 Ir. Com. Law Rep, 277; Maitland's case, 4 De G. M. & G. 769.

(*z*) See *ante*, p. 31.

(*a*) 12 Q. B. 856. See, also, Burnside *v.* Dayrell, 3 Ex. 264; Drouett *v* Taylor, 16 C. B. 671.

signed by the secretary to the company, and contained a list of banks into any of which deposits might be paid. The plaintiff had paid his deposits into one of these banks, and had received from the bankers a receipt on account of certain persons as trustees for the company. Only one of the defendants was amongst the persons on whose account the receipt of the money was thus acknowledged; and it was held that this evidence was insufficient to show a receipt by all the defendants, and the action therefore failed.

4. *Scrip.*

Scrip.

In order to enable persons who do not desire to become shareholders to acquire the right so to become, and to transfer that right to others, recourse is had to what are called "scrip certificates."

A scrip certificate is an acknowledgment by a company or its projectors, that the person named in the certificate (or more commonly the holder), is entitled to a certain specified number of shares in the undertaking. The certificate represents a right to acquire, but not necessarily an obligation to take a share. (*b*) The certificate must have a penny stamp. (*c*)

Scrip companies.

In some companies nothing is required to convert scripholders into shareholders. Companies constituted upon this principle are called scrip companies, and in them scrip and shares are synonymous, there being, in fact, no difference between scripholders and shareholders. (*d*)

*124 *Usually, however, a person entitled to scrip does not acquire the rights of an actual shareholder until his scrip certificates have been delivered up and exchanged for share certificates, nor until his name has been inserted upon the company's register of shareholders. Generally speaking, after a company is formed, its scrip is called in; *i. e.*, the holders of the scrip are required to exchange their certificates for share certificates, and to do whatever else may be necessary to render them mem-

Scripholders converted into shareholders.

(*b*) Eustace *v.* Dublin Trunk Rail. Co. 6 Eq. 182; Ormerod's case, 5 Eq. 110; Collum's case, 9 Eq. 236; Littlehampton Steam Ship Co., 34 Beav. 256, and 2 De G. J. & Sm. 521; Jackson *v.* Cocker, 4 Beav. 59; Clark *v.* Newsam, 1 Ex. 131, shows that to forge scrip was only a misdemeanor under 1 Wm. 4, c. 66. Compare 24 & 25 Vict. c. 98, § 23.

(*c*) 33 & 34 Vict. c. 97, § 3.

(*d*) As to the legality of scrip companies, see *infra*, ch. vi.

bers of the company, as distinguished from persons who have only a right to become members. In such cases as these, scripholders are not shareholders, nor are they partners either with each other or with the promoters of the company. (*e*) This doctrine results from the distinction between agreements to form a future partnership and contracts for a present partnership (*f*); but as will be seen hereafter, it does not follow that a company which progresses no further than the issue of scrip cannot be wound up; nor that upon the winding up of such a company scripholders are not liable to be put upon the list of contributories. (*g*)

The effect of a transfer of scrip will be alluded to hereafter, when treating of the transfer of shares. It may, however, be noticed here that scrip certificates may be proved by usage to pass by delivery, and if this is proved they cannot be recovered from a *bonâ fide* holder for value without notice of any infirmity in the title of the person from whom he has taken them. (*h*) Transfer of scrip.

5. *Of membership.*

Generally speaking, some condition has to be performed, some formality to be observed, before a person entitled to become a member actually becomes one, and before a person entitled to retire actually ceases to be a member. What these *conditions or formalities are in any particular case *125 can only be ascertained by examining the act of Parliament, charter, deed, or other instrument by which the company is governed; and care therefore must be taken in applying decided cases to attend to the constitutions of the companies to which they relate. (*i*) Who are members of companies.

(*e*) See the cases in note (*b*), and Fox *v.* Frith, 1 Car. & M. 502.

(*f*) As to which, see *ante*, p. 27.

(*g*) See on this subject, *Ex parte* Barclay, 26 Beav. 177; *Ex parte* Aston, 27 ib. 474, and 4 De G. & J. 320; *Ex parte* Grisewood, 4 De G. & J. 544, and the cases sited in note (*b*).

(*h*) Rumball *v.* Metropolitan Bank, 2 Q. B. D. 194. In this case the scrip was that of a banking company, and the mercantile usage was proved. *Qu.* how often will it have to be proved before the usage is judicially recognized?

(*i*) As to the construction of acts of Parliament, apparently making payment by an allottee (or some qualification) a condition precedent to his becoming a shareholder, see East Gloucestershire Rail. Co. *v.* Bartholomew, L. R. 3 Ex. 15; McEuen *v.* West Lon. Wharves, &c. Co. 6 Ch. 655, and Portal *v.* Emmons, 1 C. P. D. 201 & 664; and as to allotting shares before any business can be carried on, see *Ex parte* Ward, L. R. 3 Ex. 180.

No person can, properly speaking, be said to be a member of or shareholder in a company so long as he has only a right to become such; nor can a person who has become a member or a shareholder be properly said to have ceased to be one so long as he has only a right to retire.

Necessity of observing formalities.

If a person who is not a shareholder omits to do what is necessary to render himself a shareholder, he remains a non-shareholder, although very little may be wanting to render him a shareholder. On the other hand, if a person who is a shareholder already, omits to do what is necessary to retire, he continues to be a shareholder, whatever intention he may have had of withdrawing from the company, and whatever preliminary steps he may have taken for that purpose. In these cases that which is necessary to change an existing state of things has not happened; the right to enter or leave the company has not been exercised; and until such right has been exercised membership in the proper sense of the word has not been created in the one case, and has not ceased in the other. Subject then to the qualifications to be mentioned presently, before a person entitled to become a member actually becomes one, he must comply with all prescribed formalities.

There are many cases in the books illustrating this principle, and to which it may be convenient shortly to refer.

The repealed act 7 & 8 Vict. c. 110, defined a shareholder to mean any person entitled to a share, *and* who had executed the deed of settlement, or a deed referring to it (*k*); it was *held that no person was a shareholder within the meaning of the act if he had not signed the deed, although he might be entitled to shares and be registered and returned as a shareholder. (*l*)

7 & 8 Vict. c. 110.

*126

Other cases, in which the non-execution of the company's deed has been held to prevent a person entitled to shares in a company from being a shareholder therein, will be found in the note below. (*m*)

Non-execution of deed.

(*k*) See 7 & 8 Vict. c. 110, § 3; this definition did not apply to mutual insurance societies: see the section.

(*l*) Baily *v.* Universal Prov. Life Assoc. 1 C. B. N. S. 557; Moss *v.* Steam Gondola Co. 17 C. B. 180; Wilkinson *v.* Anglo-Californian Gold Co. 18 Q. B. 728; Stewart *v.* Same, ib. 736. The registrar's certificate that a person had been returned as a shareholder was *primâ facie* evidence of his being so. Turner *v.* Metropolitan Live Stock Co. 2 Ex. 567.

(*m*) Irish Peat Co. *v.* Phillips, 1 B. & Sm. 598; Carmarthen Rail. Co. *v.* Wright, 1 Fos. & Fin. 282; Galvanized

Again, by the repealed Joint-stock companies act, 1856, it was declared that every person who had accepted shares in a registered company, and whose name was entered in the register, and no other person (except a subscriber to the memorandum of association in respect of the shares thereby subscribed for by him), should for the purposes of the act in question be deemed to be a shareholder (*n*); and in the articles which, in the absence of other regulations applied to companies registered under the act, it was declared that no person should be deemed to have accepted any share unless he had testified his acceptance thereof, by writing under his hand in such form as the company from time to time should direct. (*o*) Under these provisions it was held that a person who merely agreed to take shares, but did not testify his acceptance of them in the particular form required, did not become a shareholder. (*p*)

19 & 20 Vict. c. 47.

Upon precisely the same principle a purchaser of shares in a company is not a shareholder in it until he has made himself such by complying with its regulations as to the admission of members (*q*); and, on the other hand, a shareholder who has *sold his shares remains a shareholder until the purchaser has taken his place. (*r*)

Purchasers of shares.

*127

Again, where shares are held by A. in trust for B., and B. has done nothing to render himself a shareholder, according to the terms of the company's regulations, and has never acted or been treated as a shareholder, he is not a shareholder, although A. may be insolvent. (*s*)

Cestuis que trustent.

But a person who has entered into a binding agreement with a company to take shares in it, cannot complain if the company acts on the faith of the agreement, and complies for him with those formalities which he is bound himself to observe. Upon this principle, where a person has

Formalities complied with by the company.

Iron Co. *v.* Westoby, 8 Ex. 17; Waterford, &c. Rail Co. *v.* Pidcock, 8 Ex. 279.

(*n*) 19 & 20 Vict. c. 47, § 19.

(*o*) 19 & 20 Vict. c. 47, table B. § 1.

(*p*) New Brunswick, &c. Rail. Co. *v.* Muggeridge, 4 H. & N. 160 and 580. Compare this case with Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481, where no particular form of acceptance was required.

(*q*) Hay *v.* Willoughby, 10 Ha. 242.

(*r*) See, for example, Mid. G. W. Rail. Co. *v.* Gordon, 16 M. & W. 804.

(*s*) See Bugg's case, 2 Dr. & Sm. 452; Newry Rail. Co. *v.* Moss, 14 Beav. 64; Jefferys *v.* Smith, 3 Russ. 158, and other cases referred to hereafter in book iv. c. 3, under the head Contributories. Compare Goddard *v.* Hodges, 1 Cr. & M. 33, and Cox's case, 4 De G. J. & Sm. 53.

agreed with a company to take shares in it and nothing remains to make him a shareholder except to register him as such (*t*), and the company registers him accordingly, he becomes a member, although he may have protested against such registration. (*u*) But it need hardly be observed that persons cannot be made members without their consent; and if a company or some other person has placed shares in a person's name, and complied with all the formalities necessary to make him a member, he will nevertheless not be a member, unless he has by agreement or otherwise authorized the acts in question, or ratified them, and thereby assented to take the shares. (*x*)

Type of a member.

The type then of a member or shareholder of a company is a person who has agreed to become a member, and with respect to whom all conditions precedent to the acquisition of the rights of a member have been duly observed. *128 Where all these * circumstances are combined, there is membership in the fullest and most accurate sense. This, indeed, would be too obvious to require express statement were it not useful to have present to the mind a standard by which to judge of other cases. In practice difficulties are only presented where this standard is not reached; and the important question really is to what extent it can be departed from, and membership be nevertheless constituted.

Membership in equity, though not in law.

In the first place, on principles of equity, a person bound by agreement with a company to take shares in it is not allowed to derive any benefit as against the company from his own default in carrying out his agreement. In other words, he will, as against himself, and as between himself and the company, be treated as a member in equity. (*y*) There are endless cases in the books in which persons not shareholders in the strict and proper sense of the word, have nevertheless been held to be contributories on the winding-up of the company. (*z*) But the

(*t*) This is essential, see Waterford, Wexford, &c., Rail. Co. *v.* Pidcock, 8 Ex. 279; Carmarthen Rail. Co. *v.* Wright, 1 Fos. & Fin. 282.

(*u*) Midland Gt. West. Rail. Co. *v.* Gordon, 16 M. & W. 804, and other cases of that class, noticed *ante*, p. 110, and *post*, 159. See, also, Leishman *v.* Cochrane, 1 Moo. P. C. N. S. 315.

(*x*) See, for examples, Edwards *v.* Kilkenny Rail. Co., 14 C. B. N. S. 826; Fox's case, 3 De G. J. & S. 465; Higg's case, 2 Hem. & M. 657.

(*y*) The subject of specific performance so far as it relates to shares will be discussed hereafter.

(*z*) These cases will be noticed hereafter. Yelland's case, 5 De G. & Sm. 395, illustrates the principle.

equitable maxim that what has been agreed to be done is to be treated as done, is only a consequence of the more general principles applicable to the specific performance of contracts; and the maxim only applies as between the parties to an agreement of which specific performance can be decreed and their representatives. If therefore a person has agreed, not with the company or its agents, but with some one else, to take shares in the company, and such person does not perform those conditions which are necessary to render him a member thereof, then whatever his position and obligations may be as between himself and the other party to the agreement, he will not be a member of the company in equity any more than at law. (*a*)

Secondly, the performance of conditions and observance of formalities may be dispensed with; and irregular, as distinguished from void, transactions may be confirmed. *Consequently, a person may become a shareholder to most, if not to all intents and purposes, without complying with all the formalities prescribed in that behalf by the statute, charter, or deed of settlement constituting the company, and although there may have been irregularities in the issue of the shares to him; for if, notwithstanding these circumstances, he has been treated as a shareholder by the company, and has acted as a shareholder, both he and the company will be estopped from denying that he is a shareholder.[1] So, if a shareholder, having a right to retire, has in fact retired and been treated by the company as if he were no longer a shareholder, both he and the company will be estopped from denying that he has ceased to be a shareholder, although he may not have retired regularly and properly. This doctrine of estoppel by conduct has been recognized both at law and in equity, but its application is attended with difficulty, and involves the important question to what extent

*129

Estoppel by conduct.

(*a*) See Hay *v.* Willoughby, 10 Ha. 242. See, also, Humby's case, 5 Jur. N. S. 215, and others of that class noticed hereafter under the head of Contributories.

[1] See, *In re* Reciprocity Bank, 22 N. Y. 17; McHose *v.* Wheeler, 45 Pa. St. 32; Graff *v.* Pittsburgh, etc. R. R. Co. 31 Pa. St. 489; Hays *v.* Pittsburg, etc. R. R. Co. 38 Pa. St. 81; Hager *v.* Cleveland, 36 Md. 476; Dayton, etc. R R. Co. *v.* Hatch, 1 Disney, 84; Chase *v.* Merrimack Bank, 19 Pick. 564; Pittsburgh, etc. R. R. Co. *v.* Stewart, 41 Pa. St. 54; Greenville, etc. R. R. Co. *v.* Coleman, 5 Rich. Law, 118; Haywood, etc. Co. *v.* Bryan, 6 Jones' Law, 82; Thompson's Liability of Stockholders, § 160, *et seq.*

prescribed formalities and conditions can be disregarded by companies, *i. e.*, by the persons who conduct their affairs, and whose obvious duty it is to observe what is prescribed. Upon this question opinions have differed, and courts of law have been much more rigorous than courts of equity in declaring informal and irregular transactions null and void. The consequence of this has been that in courts of law the doctrine of estoppel by conduct has been applied with extreme hesitation and caution against companies, and that in those courts the non-compliance of prescribed formalities has frequently been held to be conclusive upon the question of membership or no membership, notwithstanding an apparent waiver of those formalities by all parties.

The importance of the present subject requires that the leading authorities upon it should be examined, particularly with a view to establish if possible some intelligible rule whereby to determine the question of membership or non-membership, in those cases in which the formalities prescribed by the instrument constituting a company have not been complied with.

If a person is a member of a company, as between himself and the company, then, whether he is so by reason of his having
*130 become a member by complying with all requisite *formalities, or by reason of the doctrine of estoppel, he ought, upon principle, to be deemed a member to all intents and purposes. And if a person is not a member, as between himself and the company, then whether it is upon the ground that he never was a member, or upon the ground that he has ceased to be one, or upon the ground that he must be deemed to have ceased to be one, he ought, upon principle, to be treated as a non-member, unless, being a non-member, he has held himself out as a member to those who insist that he is a member. It is very true that, as a general proposition, two persons may be estopped from denying, as against each other, that which either or both of them may deny as against a third person; but it would be anomalous to hold that one of two persons, who as between themselves are estopped from denying that they are partners, may, when sued by a creditor, show that no such a partnership subsists. Nevertheless, the cases decided at law tend strongly to establish that a person who, in an action for calls, is estopped from denying that he is a shareholder, may nevertheless show that he is not one when sued by a creditor of the company.

It becomes necessary, therefore, to subdivide the cases bearing upon the present subject-matter of inquiry, and to distinguish those in which the question of membership or non-membership arises between the company on the one part, and an alleged member on the other, from those in which the question arises between the alleged member on the one part, and the creditors of the company on the other.

First, as between the company and an alleged shareholder.

1. Effect of waiver as between the company and the shareholder.

It has frequently been decided, even at law, that where a person has acquired a right to become a shareholder, and he has acted and been treated by the company as a shareholder, he is liable to calls at the suit of the company, although he may not have complied with all the formalities prescribed by the regulations of the company for the admission of members. Thus, in Burnes *v.* Pennell (*b*), the deed of settlement of a company required certain acts to be performed by every *purchaser of shares, before he could become entitled to exercise the rights of a shareholder. A purchaser of shares did not comply with the terms of the deed, but he nevertheless paid some calls made on his shares, and he was registered as a shareholder.[1] It was held that he could not resist an action for further calls on the ground that he was not a shareholder.

Burnes *v.* Pennell.

*131

Again, in a case where an act of Parliament required that the shares in a company should be transferred by deed stating the consideration for the transfer; and a person purchased shares without taking a proper transfer, the transfer being in blank, with the consideration stated untruly, but he nevertheless signed a proxy paper describing himself as a shareholder, and transmitted it to the company, and was thereupon registered as a shareholder, it was held, that in an action for calls by the company, he was estopped from denying the validity of the transfer. (*c*)

Sheffield, &c., Rail Co. *v.* Woodcock.

(*b*) 2 H. L. C. 497.

[1] Frost *v.* Walker, 60 Me. 468; Hall *v.* United States Ins. Co. 5 Gill, 484; Mississippi, etc. R. R. Co. *v.* Harris, 36 Miss. 17. See generally Thompson's Liability of Stockholders, secs. 162, 163, 170.

(*c*) Sheffield, &c., Rail. Co. *v.* Woodcock, 7 M. & W. 574. See, too, Cheltenham Rail. Co. *v.* Daniel, 2 Q. B. 281; Birmingham, Bristol, &c., Rail. Co. *v.* Locke, 1 Q. B. 256; London Grand Junc. Rail. Co. *v.* Graham, ib. 271; Cromford, &c., Rail. Co. *v.* Lacey, 3 Y. & J. 80.

So in The Cheltenham and Great Western Union Railway Com-
Cheltenham, &c. Rail Co. v. Daniel.
pany *v.* Daniel (*d*) an original subscriber to a project-
ed railway company sold his scrip to the defendant. The company, after its formation, had notice of this sale from the defendant himself; he claimed to be registered in respect of the scrip which he had purchased, and he sent the certificates for such scrip to the company. The company gave him a receipt for the certificates and registered him as a shareholder. It was held that he was properly registered, and that he was a shareholder, although the shares purchased by him had never been formally transferred to him from the vendor as required by the company's special act, and although the scrip certificates purported to be not transferable before the obtaining of the act.

Non-execution of company's deed.
Irish Peat Co. v. Phillips.
On the other hand, in The Irish Peat Company *v.* Phillips (*e*), fifty shares, not numbered, nor distinguished from each other, had been allotted to the defendant. He had paid some calls upon these shares, and
*132 he was registered as holder of them, *but he had received no certificates for them, and he had not, as required, exe-
Irish Peat Co. v. Phillips.
cuted the company's deed. He had not done anything as owner except pay calls. Further calls having been made, he declined to pay them, mainly on the ground that the terms contained in the company's prospectus and letters of allotment had not been adhered to. Being sued for calls, the Court of Queen's Bench, and also the Court of Exchequer Chamber, held that the defendant was not liable for them; but the two Courts differed in their reasons for so holding.

The Court of Queen's Bench expressed a strong opinion that neither the non-execution of the company's deed of settlement, nor the non-fulfillment of the terms contained in the company's prospectus and in the letters of allotment, afforded any defense to the action; but that Court thought that, the shares not having been numbered, calls could not be made upon them. (*f*)

The Court of Exchequer Chamber did not express any opinion upon the second point, and intimated considerable doubt whether the fact relied upon by the Court of Queen's Bench was material, but held that the non-execution by the defendant of the company's deed of settlement afforded a complete defense to the action.

(*d*) 2 Q. B. 281.
(*e*) 1 B. & Sm. 598.
(*f*) See, as to this, East Gloucestershire Rail. Co. *v.* Bartholomew, L. R.

Assuming that in the case in question the conduct of the defendant was not such as to preclude him from denying that he was a shareholder, the non-execution by him of the company's deed was a sufficient answer to the action (*g*); but it is conceived that the mere fact that a person has not executed a deed, is not sufficient to exclude the application to him of the doctrine of estoppel by conduct where that doctrine would otherwise apply.

It is true, that in the cases cited below (*h*), and in all of *which the defendant was held precluded by his own conduct from denying that he was a shareholder, it would seem that the company had no deed of settlement which shareholders were required to execute; but the same observation does not apply to The Cromford and High Peak Railway Company *v.* Lacey (*i*), which does not appear to have been cited in The Irish Peat Company *v.* Phillips. The Cromford and High Peak Railway Company was created by special act, which in terms incorporated the defendant and other persons who were in effect recited in the act to have executed a certain deed which the defendant had not done. In an action for calls, it was held that the defendant was estopped by his conduct from denying that he was a shareholder, and the Court was particularly careful not to let it be supposed that the defendant had become a shareholder *nolens volens*, by reason of the mere terms of the act. The defendant was held liable because, although he had not executed the company's deed as he ought to have done, he had with a full knowledge of all material facts acted and been treated as a proprietor of shares. *133

Cromford, &c., Rail Co. *v.* Lacey.

The foregoing authorities are sufficient to illustrate the doctrine of estoppel as applied against individuals. The same doctrine, however, is applicable against companies, as is shown by those cases in which it has been held that companies cannot treat, as continuing shareholders, persons who have transferred their shares irregularly and improperly, but who have nevertheless been dealt with by the company as no longer members of

Application of doctrine against companies.

Ex. 15; Ind's case, 7 Ch. 485.

(*g*) As in Waterford, Wexford, &c., Rail Co. *v.* Pidcock, 8 Ex. 279; Carmarthen Rail. Co. *v.* Wright, 1 Fos. & Fin. 282.

(*h*) Sheffield Rail. Co. *v.* Woodcock, 7 M. & W. 574; Cheltenham Rail. Co. *v.* Daniel, 2 Q. B. 281; Birmingham Rail. Co. *v.* Locke, 1 Q. B. 256; Lond. Grand Junction Rail. Co. *v.* Graham, 1 Q. B. 271. All of these were actions for calls, in which the defendant had not executed the deed of transfer. In Burnes *v.* Pennell, 2 H. L. C. 497, what the defendant ought to have signed was not a deed, but a minute in the company's books.

(*i*) 3 Y. & J. 80.

it. (*k*) These cases show conclusively that companies cannot, any more than individuals, take advantage of the non-observance of formalities which they have not insisted upon, and have, tactily at least, dispensed with (*l*); and they show further, that if the directors of a company, in transacting such business of the company as they are authorized to transact, neglect to observe the formalities *134 prescribed by the regulations * of the company, and treat an informal act as a formal one, and thereby induce others to do the same, the company is estopped from afterwards disputing the validity of what has thus been treated as valid by all parties. This proposition is also supported by many decisions upon the question, who are and who are not contributories under the Winding-up acts. (*m*)

Distinction between irregular and void acts.

The proposition thus established is perfectly consistent with the doctrine that companies are not bound by the acts of their directors in matters as to which the directors are not the company's agents. The extent to which directors have power to bind their respective companies will be examined hereafter. It is sufficient to draw attention in the present place to the distinction between irregular acts and acts which are altogether unauthorized and are incapable of being confirmed; and to warn the reader not to conclude from the decisions just adverted to, that a company is estopped from disputing the validity of acts done and treated as valid by its directors, if those acts are such as the directors have no authority to perform and the shareholders cannot ratify. (*n*)

Illegal issue of shares.

The cases which give rise to most difficulty in the application of the doctrine of estoppel are those in which a person has in fact acted and been treated as a shareholder in respect of shares which the company had no power to issue. If the shares can, under any circumstances, legally exist, then, however improper their issue may have been, the company and the holder of them may be estopped from denying their existence and the holding of them by him (*o*); but if they cannot legally exist, the person taking them cannot by estoppel or otherwise become a mem-

(*k*) Bush' case, L. R. 6 H. L. 37, and 6 Ch. 246; Grady's case, 1 De G. J. & Sm. 488; Lane's case, ib. 504. See, too, Bargate *v.* Shortridge, 5 H. L. C. 297; and Taylor *v.* Hughes, 2 Jo. & Lat. 24.

(*l*) As to how far a company is estopped by its own register, see *infra*, pp. 138 *et seq.*

(*m*) See Straffon's executor's case, 1 De G. M. & G. 576, and the cases in the last note but one.

(*n*) See Grady's case, 1 De G. J. & S. 488, and Lane's case, ib. 504, and the cases in the next three notes.

(*o*) Campbell's case and Hippisley's

ber in respect of them. A striking illustration of this is afforded by The Bank of Hindustan *v.* Alison (*p*), where one company had illegally amalgamated with another, and had, as part of the amalgamation scheme, issued new shares in excess of the authorized capital; the issue being held void, it was also * held, *135 that a person who had taken some new shares and paid on them, and had retained them for some time without objection, was, nevertheless, not precluded from denying that he was a shareholder. This same principle has been recognized in equity as well as at law, as will be seen hereafter when treating of contributories and of the retirement of members. (*q*)

In equity, the mere execution of a company's deed does not preclude a person from denying that he became a shareholder (*r*), and it is presumed that now the same doctrine will apply at law. Estoppel by deed.

In connection with the doctrine of estoppel by conduct, it is important to consider the effect of ignorance of material facts. Upon general principles it is conceived that a person who induces others to act upon the faith of an untrue representation innocently made by himself, cannot, as against them, take advantage of his own want of information; as between them and him they ought not to be prejudiced by the circumstance that he would not have made the representation if he had been better informed. But except where a person has induced others to act on his own representations, ignorance of material facts on his part affords a sufficient reason for not holding him bound by what in such ignorance he may have said or done. Accordingly, it has been held that if a company, in ignorance of material facts, is induced to register an improper transfer of shares, it is not precluded from denying as against the transferee his title as a shareholder (*s*); although it cannot deny his legal title as against other persons who, on the faith of the company's register, or a certificate of his title, Effect of ignorance of material facts.

case, 9 Ch. 1; Challis's case, 6 Ch. 266; Hare's case, 4 Ch. 503.

(*p*) L. R. 6 C. P. 54 & 222. The Court of Chancery took a different view of the facts of this case; (see 9 Ch. 1) for the reasons given in 9 Ch. 17.

(*q*) Stace and Worth's case, 4 Ch. 682, Smith's case, ib. 611; Spackman *v.* Evans, L. R. 3 H. L. 171.

(*r*) Coleman's case, 1 De G. J. & Sm. 495. It was otherwise at law. See Hull Flax Company *v.* Wellesley 6 H. & N. 38.

(*s*) Hare *v.* London and North-Western Rail Co. Johns. 722.

have *bonâ fide* bought his shares without notice of the impropriety in the transfer to himself. (*t*)

*136 **Secondly, as between an alleged shareholder and a creditor.*

Effect of waiver as between shareholders and creditors.

Whether a person is liable, as a shareholder, to be proceeded against by the creditors of an incorporated or quasi-incorporated company, depends upon the construction of the statute or charter which enables him to be proceeded against; and Courts of law have adhered very strictly to the language of the statute or charter. (*u*) The doctrine of estoppel has not been applied in these cases, so as to enable a creditor to proceed against a person who, though not a shareholder, has been treated by the company as if he were one, or so as to prevent a creditor from proceeding against a person who, though he has not ceased to be a shareholder according to the company's regulations, has been treated by the company's officers as no longer a shareholder in point of fact.[1]

Moss *v.* Steam Gondola Co.

In Moss *v.* The Steam Gondola Company (*x*), a person who had acted as a director of a company was held not to be liable to creditors as a shareholder unless he had executed the company's deed, that being necessary to render him a shareholder as between himself and the company. Upon the same principle, where a married woman was a shareholder in a company, and her husband was not entitled to act as a shareholder until he had complied with certain regulations, it was held that he was not liable to be proceeded against as a shareholder by creditors, as he had not complied with those regulations, although he had received his wife's

(*t*) See Shropshire Union Rail Co. *v.* R. L. R. 7 H. L. 496, reversing S. C. L. R. 8 Q. B. 420; Ward *v.* South-Eastern Rail Co. 2 E. & E. 812; Bahia and San Francisco Rail. Co. L. R. 3 Q. B. 584; Hart *v.* Frontino and Bolivia Mining Co. L. R. 5 Ex. 111.

(*u*) See Portal *v.* Emmens, 1 C. P. D. 201 & 664, and the cases there cited.

[1] Where the transfer of shares has not been completed in accordance with the requirements of the statute, charter, deed of settlement, or articles of association, notwithstanding it may be binding as between the parties to the transfer, it will not release the tranferror from his liability to creditors. Dane *v.* Young, 61 Me. 160; Worrall *v.* Judson, 5 Barb. 210; Shellington *v.* Howland, 53 N. Y. 371; Wehrman *v.* Reakirt, Cin. Supr. Ct. 230; Thompson's Liability of Stockholders, § 217.

(*x*) 17 C. B. 180. See, too, Bailey *v.* Universal Prov. Life Ass. 1 C. B. N. S. 557.

dividends, and had voted at meetings, and otherwise acted as a shareholder. (*y*)

The principles thus recognized and acted upon in Courts of law, were pushed to their utmost extent in another case, where a person who had, in fact, retired from a company, was sought to be proceeded against as if he were still a shareholder. The case in question is instructive, as it was litigated both at law and in equity, and was carried to the * House of Lords; it moreover *137 shows, better than any other, the different tendencies of the Courts of law and equity to hold companies bound by the conduct of their managers and directors in matters of mere form. The case in question was decided at law under the name of Bosanquet *v.* Shortridge, in equity under the name of Shortridge *v.* Bosanquet, and in the House of Lords under the name of Bargate *v.* Shortridge.

In Bosanquet *v.* Shortridge (*z*), as it first came before the Court, the plaintiff, who had obtained judgment against the public officer of a banking company, sought to enforce that judgment against the defendant, who was alleged to be a member of the company. The defendant had been a shareholder, but he had sold his shares to another person, and the transfer thereof to him was registered in the company's register. By one of the rules of the company, no person was to be registered as a shareholder without the consent of a board of directors, and in this case no such consent had been obtained; and some time after the transfer had been registered the directors declared the transfer void, and they put the defendant again on the list, and returned him as a shareholder. They did this for the express purpose of enabling the plaintiff, as a creditor, to proceed against him. It appeared that in point of fact transfers had been for years registered like the one in question, viz., without the observance of the formalities required by the company's deed. The Court of Exchequer held that the defendant had not ceased to be a shareholder; that he still was a shareholder within the true intent of the company's deed; and that he was therefore liable to be proceeded against by the creditors of the company.

Bosanquet *v.* Shortridge.

In consequence of this decision, the suit of Shortridge *v.* Bosanquet (*a*) was instituted for the purpose, first, of having it declared that the plaintiff (*i. e.*, the defendant at law)

Shortridge *v.* Bosanquet.

(*y*) See Ness *v.* Angas, 3 Ex. 805; Ness *v.* Armstrong, 4 ib. 21.

(*z*) 4 Ex. 699.

(*a*) 16 Beav. 84.

was no longer a shareholder in the company, that his name might be erased from its books, and not be returned to the stamp office as if he were a member; and for that purpose secondly, of restraining the creditor from proceeding to execution against *138 *the plaintiff. The Master of the Rolls held that, after what had taken place, the company could not insist that the plaintiff was still a shareholder, or that his transferee was not; and, it being established that the creditor was proceeding at the instigation of the company, an injunction was granted as prayed by the bill.

From this decree the creditor appealed to the House of Lords,

Bargate v. Shortridge.

but the decree was there affirmed, upon the ground that the company could not take advantage of the non-observance by its own officers of formalities required by its own deed. (*b*)

The decision thus affirmed is in conformity with a prior decision

Taylor v. Hughes.

made in Ireland in a case where it was held that a shareholder in a banking company had, as between himself and the company, ceased to be a member thereof, although he had retired irregularly; and that, having ceased to be a member as between himself and the company, he was not liable to be sued as a member by a creditor of the company, instigated to sue him by its directors. (*c*)

In both of these cases the creditor was suing at the instigation

Observations on these cases.

of the company. Had it not been for this circumstance there would have been no ground on which a court of equity could have restrained him from exercising his legal rights. Nor is there any case in which a court of equity has assisted a creditor against a person held at law not to be liable to be proceeded against as a shareholder. Indeed, except under very special circumstances, a court of equity would have no jurisdiction in the matter.

6. *Of registers of shareholders and certificates of title to shares.*

With reference to the question whether a person is or is not a

Register of Shareholders.

shareholder in a company, the state of its register of shareholders is of considerable importance.

(*b*) Bargate *v.* Shortridge, 5 H. L. C. 297, decided by Lord St. Leonards, affirming the judgment of Sir John Romilly, Lord Cranworth not concurring.

(*c*) Taylor *v.* Hughes, 2 Jo. & Lat. 24.

Shares in companies being marketable commodities, *transferable from one person to another, some method of *139 registration is indispensable, in order that the persons who are at any given time members of the company may be known. But a register of shareholders would be of little use if it were not admissible in evidence both for and against every person whose name is upon it; and it is therefore necessary, not only to have a register, but to make it evidence in judicial proceedings. The simplest, and at the same time most just way of accomplishing this is, to compel every member either to write his name in a book kept by the company, or to give some officer of the company a written authority to insert his name therein. Another, but much more arbitrary way, is to make it the duty of every company, or of some official, to keep a register of shareholders, and to make that register evidence against any one whose name may be upon it, without the necessity of showing by what authority it was put there. The former of the modes is commonly had recourse to in mining districts where partnerships with transferable shares have long been known; but the latter mode has been adopted by the legislature, and prevails in most companies governed by acts of parliament. (*d*) A parliamentary register of shareholders thus becomes a most important document; for, speaking generally, unless a person is on it, he is not entitled to the rights of a shareholder, whilst if he is on it, he is subject to all the liabilities of a shareholder, unless he can show that his name ought not to have been on the list. The acts of Parliament relating to registers of shareholders are unfortunately numerous and differently worded, and it is necessary, before determining the effect of being on or off the register of a particular company, to examine the provisions of the act which applies to it.

Register as evidence.

One or two general rules relating to these registers regarded as evidence of membership, may, however, be usefully adverted to:—

General rules on this subject.

1. The rule that a register or official return shall be evidence in favor of a company keeping or making it, is contrary to general principles of evidence and is a great privilege, and in *order to enjoy this privilege, the register or return must *140

(*d*) The making of companies' books evidence against their members is not a new device. See Bristol and Taunton, &c. Co. *v.* Amos, 1 M. & S. 569.

be kept, or made as required by the statute making it evidence. (*e*)

2. At the same time, if the provisions of the statute are substantially complied with, the register or the official return, as the case may be, will be admissible in evidence, although it may be in some respects inaccurate or informal, *e. g.*, if a shareholder's residence is omitted (*f*); if some of the amounts paid are not entered (*g*); if the numbers of the shares are omitted (*h*); if the heading of the return is not strictly accurate (*i*); if the return does not purport to be signed by the person whose duty it is to sign it (*k*); if it was signed at the wrong time. (*l*) Moreover, inaccuracies as to some persons do not prevent the register or return from being evidence against others as to whom there is no inaccuracy. (*m*) But if what is called a register is only a rough memorandum, it cannot be regarded, although it is sealed. (*n*) A share ledger however has been held sufficient. (*o*)

3. A person whose name is inaccurately stated, but whose identity can be established, cannot escape liability as a shareholder on the ground of the inaccuracy (*p*); and the use of a fictitious name only increases the difficulty of proving identity. (*q*)

*141 *4. The register or return is no evidence of the membership of a person except at and after the date at which the register or return becomes official. (*r*)

(*e*) Bain *v.* Whitehaven, &c. Rail. Co. 3 H. L. C. 1.

(*f*) Wills *v.* Murray, 4 Ex. 843.

(*g*) Bain *v.* Whitehaven Rail. Co. 3 H. L. C. 1; Lon. and Grand Junc. Rail. Co. *v.* Freeman, 2 Man. & Gr. 606; Birmingham and Bristol Rail. Co. *v.* Locke, 1 Q. B. 256; Lon. and Grand Junc. Rail. Co. *v.* Graham, ib. 271.

(*h*) Ib. and East Gloucestershire Rail. Co. *v.* Bartholomew, L. R. 3 Ex. 15.

(*i*) Bain *v.* Whitehaven Rail Co. 3 H. L. C. 1; Dosset *v.* Harding, 1 C. B. N. S. 524; Powis *v.* Harding, ib. 533.

(*k*) Harvey *v.* Scott, 11 Q. B. 92; Field *v.* Mackenzie, 4 C. B. 705.

(*l*) Henderson *v.* Royal British Bank, 7 E. & B. 356; Daniel *v.* Royal British Bank, 1 H. & N. 681.

(*m*) Southampton Dock Co. *v.* Richards, 1 Man. & Gr. 448; London and Brighton Rail. Co. *v.* Fairclough, 2 ib. 674.

(*n*) Wolverhampton New Waterworks Co. *v.* Hawkesford, 6 C. B. N. S. 336; 7 ib. 795, and 11 ib. 456, approved by the Exchequer Chamber in Irish Peat Co. *v.* Phillips, 1 B. & Sm. 638. See, too, Birkenhead, Lancashire, &c. Rail. Co. *v.* Brownrigg, 4 Ex. 426; Cheltenham and Great Western Rail. Co. *v.* Price, 9 C. & P. 55.

(*o*) Weikersheim's case, 8 Ch. 831.

(*p*) Thompson *v.* Harding, 1 C. B. N. S. 555; Clowes *v.* Brettell, 11 M. & W. 461.

(*q*) Arthur *v.* Midland Rail. Co. 3 K. & J. 204.

(*r*) Aylesbury Rail. Co. *v.* Thompson, 2 Ra. Ca. 668; Cheltenham Rail. Co. *v.* Price, 9 C. & P. 55. Compare Bosanquet *v.* Shortridge, 4 Ex. 699.

5. Unless the statute making the register or return evidence, clearly and indisputably makes it conclusive evidence, the register or return will be *primâ facie* evidence only of the truth of the statements in it; so that not only may a person whose name is on the register or return show that his name ought not to have been there (*s*); but a person whose name is not in it may be shown to have been in fact a member when the register or return became official (*t*); so if no register has been kept. (*u*)

6. It follows that a company is not necessarily estopped by its own register. This was assumed by the Court of Exchequer in The Waterford and Wexford Railway Company *v.* Pidcock (*v*), where the defendant was held not to be liable to calls because, though on the register, he had been placed there before he had become a shareholder; and because, notwithstanding the register, he was not entitled to exercise the rights of a shareholder. (*w*) So where a company has, in ignorance of material facts, registered a forged or improper transfer, it is not estopped by its register from denying *as against the registered transferee that *142 he is a shareholder. (*x*)

7. A person improperly registered as a shareholder in a company, cannot be considered as holding himself out as a shareholder merely because he takes no steps to have his name removed. (*y*)

(*s*) See Powis *v.* Butler, 3 C. B. N. S. 645, and 4 ib. 469; Galvanized Iron Co. *v.* Westoby, 8 Ex. 17; Waterford, Wexford, &c. Rail. Co. *v.* Pidcock, 8 Ex. 279; Carmarthen Rail. Co. *v.* Wright, 1 Fos. & Fin. 282; Shropshire Un. Canal Co. *v.* Anderson, 3 Ex. 401; Bailey *v.* Universal Prov. Life Ass. 1 C. B. N. S. 557; Moss *v.* Steam Gondola Co. 17 C. B. 180; Wilkinson *v.* Anglo-Californian Gold Co. 18 Q. B. 728; Stewart *v.* Same, ib. 736; Edwards *v.* Kilkenny Rail. Co. 14 C. B. N. S. 526; Birch's case, 2 De G. & J. 10.

(*t*) See Rastrick *v.* Derbyshire, &c. Rail. Co. 9 Ex. 149; Prescott *v.* Buffrey, 1 C. B. 41; Bank of England *v.* Johnson. 3 Ex. 598; Wolverhampton Waterworks Co. *v.* Hawkesford, 6 C. B. N. S. 336; 7 ib. 795, and 11 ib. 546; Whittet's case, 2 De G. & J. 577. The question whether a person is a contributory or not in consequence of being on or off the register will be adverted to in a subsequent chapter.

(*u*) See Portal *v.* Emmens, 1 C. P. D. 201 & 664, which turned on the Companies' Clauses Cons. Act and a special act.

(*v*) 8 Ex. 279.

(*w*) See, too, Shropshire Union, &c. Co. *v.* Anderson, 3 Ex. 401, and the other cases in notes (*s*) and (*t*).

(*x*) Hare *v.* Lond. and N.-W. Rail. Co. Johns, 722. But as to persons acting on the faith of the register, see Ward *v.* S. E. Rail Co. 2 E. & E. 812; and Hart *v.* Frontino and Bolivia Mining Co. L. R. 5 Ex. 111. See, also, *infra*, p. 145, note (*x*).

(*y*) See Somerville's case, 6 Ch. 266; Bullock *v.* Chapman, 2 De G. & S. 211; Birch's case, 2 De G. & J. 10.

But as regards some companies, it is enacted that a person once properly registered as a shareholder, is to be deemed a shareholder so long as his name remains on the register (*z*); and as will be seen hereafter, a person once put on the register with his consent may lose his right of repudiating his shares by delaying to have his name removed. (*a*)

Correction of register.

Where a company or its officers are required to keep a register of shareholders, it is their duty to keep such register accurately, and if they refuse to insert the name of a person entitled to be registered, or to erase the name of a person improperly registered, in either case upon complaint being made to the proper tribunal, the company or its officers will be ordered to correct the register. Several modern acts of Parliament contain express provisions upon the subject of correcting registers, and these provisions will be noticed hereafter when treating of the companies to which they relate. But even where there is no statutory enactment expressly applicable to the case, a mandamus or an injunction will be granted to compel a company, required by statute to keep a register, to insert a name improperly excluded (*b*), or to compel the company to remove a name improperly inserted. (*c*) A mandamus *will not however go to compel a company to remove its seal from a register which it has sealed, although it may be shown that the register is incorrect, and that it has been sealed without authority. (*d*)

Mandamus and injunction.

*143

Correction of register.

A person asserting his right to be on the register, must prove his title to the shares in respect of which he claims to be registered (*e*), and his right to be on the register (*f*); but if he has already been registered, and he complains of being struck off, the onus is

(*z*) See *Ex parte* Prescott Mon. & Ch. 611; Harvey *v.* Scott, 11 Q. B. 92. This subject will be reverted to hereafter.

(*a*) See Oakes *v.* Turquand, L. R. 2 H. L. 325, and other cases of that class.

(*b*) R. *v.* Carnatic Rail. Co. L. R. 8 Q. B. 299, a case of a married woman; R. *v.* Shropshire Union Rail Co. L. R. 8 Q. B. 420, reversed, but not on this point, L. R. 7 H. L. 496; Norris *v.* Irish Land Co. 8 E. & B. 512; Ward *v.* S.-E. Rail. Co. 2 E. & E. 812.

(*c*) Eustace *v.* Dublin Trunk Rail. Co, 6 Eq. 182; Taylor *v.* Hughes, 2 Jo. & Lat. 24; Shortridge *v.* Bosanquet, 16 Beav. 84. In Bullock *v.* Chapman, 2 De G. & S. 211, the Court declined to interfere, the case not being sufficiently clear.

(*d*) *Ex parte* Nash, 15 Q. B. 92.

(*e*) Daly *v.* Thompson, 10 M. & W. 309.

(*f*) British Sugar Co., 3 K. & J. 408.

on the company to show its right to remove his name. (*g*) It has been held that a mandamus will not be granted in favor of a person who seeks to become a registered shareholder for the purpose of being troublesome (*h*); nor in favor of a person whose own negligence has occasioned the state of things which he seeks to have rectified. (*i*) Moreover, where an important question, *e. g.*, liability to calls is actually pending between a person and a company, a summary application to rectify the register will not be entertained, unless it can be shown that it is necessary to rectify the register in order that the real question in dispute may be fairly decided. (*j*) But the mere fact that the application to have the register rectified involves the decision of an important and difficult question is not sufficient to induce the Court to refrain from ordering it to be rectified. (*k*) Nor will the Court decline to order the name of a person to be struck off the register simply because his shares are marked forfeited and his name has * been *144 already removed. (*l*) The order to remove is a great security.

Where a register is rectified by order, it should so appear on the register. (*m*)

Where a person on the register applies to have his name struck off, and the name is alleged not to refer to him but to some other person, the Court will not expunge the name until satisfied upon the question of identity. (*n*)

The right of a married woman to be registered has been noticed already. (*o*)

(*g*) See Ward *v.* S.-E. Rail. Co. 2 E. & E. 812; East Wheal Martha Mining Co. 33 Beav. 119.

(*h*) See Reg. *v.* Liverpool, Manchester, &c. Rail. Co. 21 L. J. Q. B. 284.

(*i*) See *Ex parte* Swan, 7 C. B. N. S. 400, and Swan *v.* North Brit. Australian Co. 7 H. & N. 603, and 2 H. & C. 175. The extreme diversity of opinion of the judges before whom this important case came renders it unsatisfactory as a guide for the future. Compare Tayler *v.* Great India Peninsular Rail. Co. 4 De G. & J. 559; and see the observations of V.-C. Malins in 11 Eq. 319.

(*j*) Anglo-French Porcelain Co. *v.* Harris, 5 H. & N. 809; British Sugar Refining Co. 3 K. & J. 408. These cases, however, turned on acts of Parliament differently worded from the Companies act, 1862, as to which see *infra*.

(*k*) Higg's case, 2 Hem. & M. 657; Los' case, 6 N. R. 327.

(*l*) Martin's case, 2 Hem. & M. 669; Los' case, 6 N. R. 327.

(*m*) See Iron Ship-Building Co. 34 Beav. 597.

(*n*) See Webb's case, 7 Jur. N. S. 856, where a person was removed from the list of contributories, but his name was left on the register of shareholders.

(*o*) *Ante*, p. 85.

With respect to the registration of titles to shares, it has been held that a company is not bound to register complicated deeds of transfer, *e. g.*, marriage settlements by which shares are assigned to trustees upon the usual trusts for the husband and wife, and their children. (*p*)

Right of company to alter its register.

Companies are too frequently in the habit of altering their own registers by striking off the names of persons whom they do not wish to recognize as shareholders, and by substituting other names in their places. Such proceedings cannot be too strongly reprobated. (*q*) When once a person is registered as a shareholder, and his name has been since removed, the onus of justifying the removal is on the company; and it has been held, that even where his title is defective the company has no right to strike off his name unless his shares are claimed by a person establishing a better title to them. (*r*) A company can however, rectify its register in order to correct its own mistakes. (*s*)

Actions for improper exclusion from or insertion in register.

A person entitled to be registered as a shareholder by a company can maintain an action against a company, or those of its officers whose duty it is to register him as a shareholder, *if they wrongfully refuse *145 to register him. In such an action it is no defense that the register is full, if it is so improperly (*t*); and if the plaintiff complains that, in consequence of his name not being registered, his shares have been forfeited without notice to him, it is no defense that the forfeiture is a mere nullity, and that the plaintiff has therefore sustained no damage. (*u*) The principles on which these decisions are based are, it is conceived, sufficient to support an action for damages by a person improperly inserted in a company's register; but the writer is not aware of any case bearing directly on this point.

Right to register a person against his will.

It has been already seen that if a person is bound by agreement with a company to take shares in it, the

(*p*) Reg. *v.* General Cemetery Co. 6 E. & B. 415; Copeland *v.* North-E. Rail. Co. ib. 277.

(*q*) See the judgments in the cases below.

(*r*) See Ward *v.* South-E. Rail. Co. 2 E. & E. 812. Hart *v.* Frontino and Bolivia Mining Co. L. R. 5 Ex. 111. Compare Hare *v.* Lond. North-W. Rail. Co. Johns. 722.

(*s*) Hartley's case, 18 Eq. 542, and 10 Ch. 157; *Re* Etna Ins. Co. Ir. Rep. 7 Eq. 264.

(*t*) Daly *v.* Thompson, 10 M. & W. 309.

(*u*) Catchpole *v.* Ambergate, &c. Rail. Co. 1 E. & B. 111.

company is entitled without more, to act on the agreement and to register him as a shareholder. (*v*)

In addition to the evidence of membership obtainable from registers of shareholders, many companies are required by statute to give every shareholder, on demand, a sealed certificate of his ownership of the shares, to which he is entitled. The object of this is to enable a shareholder to prove that he is such; and particularly to enable him, upon a sale of his shares, to prove his title to them to the satisfaction of a purchaser. (*w*) The company cannot dispute the truth of the certificate as against a person who has bought on the faith of it. (*x*) But the certificate applies only to the legal, not to the equitable title of the person named in it. (*y*) No person is entitled to demand a certificate of title to shares in a company until he has done everything necessary to constitute himself a shareholder in the full sense of the word. (*z*)

Certificates of title.

---

*SECTION II.—AS TO DIFFERENT CLASSES OF COMPANIES. *146

Having made these preliminary observations, it is proposed to advert to the formation of different kinds of companies, and to the evidence by which a person may be proved to be a shareholder in them.

Formation of companies.

It will be convenient to take them in the following order:—

CLASS I. Cost-book mining companies.

CLASS II. Companies incorporated or privileged by the Crown, viz.:—

1. Chartered companies.
2. Companies formed under the Letters patent act, 7 Wm. 4 & 1 Vict. c. 73.

(*v*) *Ante*, p. 127.

(*w*) See upon this subject, Hare *v.* Waring, 3 M. & W. 362; Curling *v.* Flight, 6 Ha. 41, and 2 Ph. 613; Shaw *v.* Fisher, 2 De G. & S. 11.

(*x*) Bahia and San Francisco Rail. Co. L. R. 3 Q. B. 584; Hart *v.* Frontino and Bolivia, &c. Mining Co. L. R. 5 Ex. 111. Comp. *ante*, p. 142, note. (*x*)

(*y*) Shorpshire Union Rail. Co. *v.* R. L. R. 7 H. L. 496, reversing S. C. L. R. 8 Q. B. 420.

(*z*) Wilkinson *v.* Anglo-Californian Gold Co. 18 Q. B. 728; Stewart *v.* Ang. Cal. Gold Co. ib. 736.

CLASS III. Companies incorporated or privileged by some special act of Parliament, viz.:—

1. Companies not incorporated, but empowered to sue and be sued.
2. Incorporated companies.

CLASS IV. Companies incorporated or privileged by a general act of Parliament, viz.:—

1. Banking companies formed under 7 Geo. 4, c. 46.
2. Registered companies.

CLASS I.—COST-BOOK MINING COMPANIES.

Cost-book companies.

Cost-book mining companies are sometimes represented as differing essentially from ordinary partnerships; but there is no authority for this statement; and it may be said with more truth that cost-book mining companies are mere partnerships governed by the general law of partnership, except so far as that law is excluded by local custom or by special agreement referring to and embodying such custom. (*a*) A cost-book mining company is formed by agreement. A number of adventurers who have obtained permission to work a lode agree to share the *147 enterprise in certain proportions. It is seldom that *they agree on a fixed capital. (*b*) They appoint an agent, commonly called a purser, for the purpose of managing the affairs of the mine, subject to the control of the shareholders. They write in a book called the "cost-book" the agreement into which they have entered; and in this same book are inserted from time to time the receipts and expenditure of the mine, the names of the shareholders, their respective accounts with the mine, and transfers of shares. (*c*) The shares are transferable, and may be relinquished; they may also be sold by the company for non-payment of calls, and these circumstances, rather than any

Cost-book.

(*a*) See, as to Cost-book mining companies, 32 & 33 Vict. c. 19, the Readwin Prize Essay on the Cost-book, by Tapping; Collier on Mines, ed. 2, pp. 111, *et seq.* Batten's Stannaries Act, 1869.

(*b*) Mr. Batten in his useful little treatise, p. 31, says that a true cost-book company never has a fixed capital.

(*c*) See 32 & 33 Vict. c. 19, § 9. The rules and regulations must now be filed with the registrar of the Stannaries Court, ib.

other, distinguish cost-book mining companies from common partnerships. (*d*)

Some persons imagine that the liability of shareholders in cost-book mining companies is limited; that both their past as well as their future liability is got rid of as soon as they have transferred their shares, and that they are in no case liable for the debts of the mine if they have paid the calls which may have been made upon their shares. All this is mere delusion; and although it is true that a shareholder can as between himself and co-shareholders, get rid of his liability by transferring or relinquishing his shares (*e*), there is no authority whatever for saying that the liabilities of the shareholders to creditors were until lately governed by principles in any respect different from those which apply to ordinary partnerships. (*f*) By the Stannaries act, 1869 (32 & 33 Vict. c. 19, s. 25), however, a past shareholder is not liable to contribute to the assets of the company if he has ceased to be a shareholder two years or upwards before the mine ceased to be worked, or before the date of the winding-up order.

Liability to creditors.

*Whoever alleges that a cost-book mining company is in any respect governed by a local usage which excludes the application of the general law of partnership, must prove the existence of such usage; for the courts do not take judicial notice of what the cost-book principle is; and they invariably apply the general law of partnership to companies formed on that principle, unless it is proved that the application of such law is excluded as alleged. (*g*) *148

Mining customs not judicially noticed.

The question whether a person is or is not a shareholder in a cost-book mining company, must be determined in precisely the same way as the question whether a person is or is not a member of an ordinary partnership. (*h*)

Proof of membership in a cost-book company.

(*d*) 32 & 33 Vict. c. 19, §§ 16–23.

(*e*) Fenn's case, 4 De G. M. & G. 285; Mayhew's case, 5 ib. 837; Bodmin United Mines, 23 Beav. 370; Birch's case, 2 De G. & J. 10; Lofthouse's case, ib. 69.

(*f*) Shareholders in a cost-book mine were held liable to creditors for goods supplied in Tredwen *v.* Bourne, 6 M. & W. 461; Newton *v.* Daly, 1 Fos. & Fin. 26; Lanyon *v.* Smith, 3 B. & Sm. 938; Harvey *v.* Clough, 2 N. R. 204. See, too, Ellis *v.* Shmæck, 5 Bing. 521; Peel *v.* Thomas, 15 C. B. 714; Toll *v.* Lee, 4 Ex. 230.

(*g*) See Hawkins' case, 2 K. & J. 253; Bodmin United Mines, 23 Beav. 370; Fenn's case, 4 De G. M. & G. 285; Hart *v.* Clarke, 6 ib. 232, and 6 H. L. C. 633; Sibley *v.* Minton, 27 L. J. Ch. 53, V.-C. Kindersley. The purser can now sue a shareholder for calls. See 32 & 33 Vict. c. 19, § 13. See before this act, Hybart *v.* Parker, 4 C. B. N. S. 209.

(*h*) See Peel *v.* Thomas, 15 C. B. 714;

The usual mode of proving that a person is a shareholder in a cost-book mine is by showing that he has signed the cost-book or an authority for the insertion of his name in it; and it has been said to be part of the cost-book principle that a register of shareholders should be kept, and that every member should sign either the book itself, or an authority for the insertion of his name in it. (*i*) At the same time, a person clearly may, as between himself and third parties, incur the liabilities of a shareholder without signing the cost-book or any such authority as that referred to (*j*); and it is apprehended that a person may be a shareholder as between himself and the other members, although he may not have signed the cost-book or any authority for the insertion of his name in it. Indeed, there is reason for going further, and for denying that any such signature is essential; for an attempt to prove it to be so is reported to have failed, the evidence *149 adduced amounting only to this, that it was * usual for every member to testify his acceptance of shares by writing under his hand. (*k*)

Signing the cost-book.

In Vice *v.* Anson, (*l*) the Court seems to have thought that a person could not be a shareholder in a cost-book mining company unless he acquired some interest in the mine, treating it as land, and that some deed conveying him an estate in the land was requisite. But this opinion cannot be supported; and it seems clear that shares in a cost-book mining company are transferable by entries in the cost-book; and that a person who is entered therein as a shareholder in respect of shares accepted by him is a shareholder, although no deed or writing at all has been executed. (*m*) Shares in cost-book mining companies are ordinarily transferred by a document in which the transferor acknowledges that he has transferred, and the transferee ac-

Vice v. Anson.

Transfer of shares.

Tredwen *v.* Bourne, 6 M. & W. 461; Thomas *v.* Clark, 18 C. B. 662.

(*i*) See Tippett *v.* Johns, Tapping's Essay, p. 187; Toll *v.* Lee, 4 Ex. 230. Such a register is now required, see 32 & 33 Vict. c. 19, § 9.

(*j*) See Martyn *v.* Gray, 14 C. B. N. S. 824, as to holding out; and see Cox's case, 4 De G. J. & Sm. 53, where a person entitled to shares tried to screen himself from liability by holding them in the names of other people.

(*k*) Northey *v.* Johnson, 19 L. T. 104, Q. B. 1852. That this is usual there can be no doubt; it is expressly required by the rules of most large mines.

(*l*) 7 B. & C. 409.

(*m*) See Tippett *v.* Johns, Tapping's Essay, p. 187; Reynolds *v.* Bassett, Collier on Mines, 124, note; Northey *v.* Johnson, 19 L. T. 104; Toll *v.* Lee, 4 Ex. 230. Compare Curling *v.* Flight, 5 Ha. 242; 6 ib. 41; and 2 Ph. 643.

knowledges that he has accepted the shares mentioned. This document is signed by both parties, is addressed to the purser, is sent to him by the transferee, and is the authority to the purser to register the transferee as a shareholder. (*n*)

By 33 & 34 Vict. c. 97, s. 3; and schedule, title *Transfer*, a 6*d*. stamp duty is imposed upon "any request or authority to the purser or other officer of any mining company conducted on the cost-book system, to enter or register any transfer of any share or part of a share in any mine; or any notice to such purser or officer of such transfer." (*o*) Stamp.

Companies engaged in working mines within and subject to the jurisdiction of the Stannaries, need not be registered under the Companies acts of 1862; (*p*) but if their capital is fixed, and if there are seven or more shareholders, they may be so *registered, with or without limited liability. *150 If the capital is not fixed, the company cannot apparently be registered as an existing company with limited liability. (*q*) The effect of registration under the Companies act, 1862, will be considered hereafter. (*r*) If not registered under that act, cost-book mining companies working mines within the Stanneries are subject to the provisions of 32 & 33 Vict. c. 19, which will be noticed in their proper places. Registration.

Class II.—Companies chartered or privileged by the Crown.

1. *Chartered Companies.*

The Crown has at common law the power of incorporating by charter any number of persons who assent to be incorporated: and a chartered company is therefore formed as soon as a charter is granted to, and accepted by, two or more individuals, enabling them, alone or with others, to trade as a body Chartered companies.

(*n*) Toll *v.* Lee, 4 Ex. 230; Walker *v.* Bartlett, 18 C. B. 845. See, as to parol transfers, Northey *v.* Johnson, 19 L. T. 104, Q. B. See, also, 32 & 33 Vict. c. 19, §§ 14, 15, and 35.

(*o*) It is said that the cost-book itself requires no stamp. See Coll. on Mines, 153, note, citing Vivyan *v.* Mowatt, 8 L. J. Ex. 480, which, however, is a wrong reference.

(*p*) 25 & 26 Vict. c. 89, § 4.

(*q*) See 25 & 26 Vict. c. 89, § 179; cl. 3, and § 181.

(*r*) As to the effect of registration with respect to retired shareholders, see Lanyon *v.* Smith, 3 B. & Sm. 938; and Harvey *v.* Clough, 2 N. R. 204.

corporate. (*s*) The Crown, however, has no power to incorporate persons against their will (*t*); nor can the Crown force a new charter upon upon a corporation after it is once established. A charter which has been confirmed by act of Parliament cannot be varied by the Crown (*u*); but a charter which has not been so confirmed may, without being formally surrendered (*x*), be varied by a subsequent and inconsistent charter (*y*), provided the new charter is accepted by the body corporate (*z*), *i. e.*, by a majority of the members composing it. (*a*)

*151 * A chartered company is a corporation existing for the purposes for which it is created and no others; and those persons only are members of it who are declared to be so by the charter, or who have been admitted in compliance with the charter and the by-laws made in pursuance of it. (*b*) The charter of a company is a law set to it and to the individuals composing it, and they have no power by any agreement amongst themselves to annul or legally do anything at variance with their charter. (*c*) This subject will be adverted to hereafter.

Chartered company not a partnership.

A chartered company, being a corporation, is not a partnership, although the company may have gain for its object, and the members of the company may share profits.

Validity of charters.

A charter is not necessarily of any legal value; for it may have been obtained from the Crown by misrepresentation, or it may have been granted by the Crown in excess of its prerogative, and in either case the charter will be void. In a recent case a charter which had been obtained from the Crown by false and fraudulent statements was formally annulled by *scire*

(*s*) See, as to charters, Grant on Corporations, pp. 9, *et seq.*

(*t*) Grant, pp. 13 and 18; Dr. Askew's case, 4 Burr. 2200, *per* Yates, J.; and see Rutter *v.* Chapman, 8 M. & W. 1.

(*u*) R. *v.* Miller, 6 T. R. 268; but see Royal Exch. Ass. Co. *v.* Vaughan, 1 Burr. 155.

(*x*) R. *v.* Larwood, 1 Salk. 168.

(*y*) Ib.; and R. *v.* Haythorne, 5 B. & C. 410; Royal Exch. Ass. Co. Vaughan, 1 Burr, 155.

(*z*) Bull. N. P. 212, c.; R. *v.* Passmore, 3 T. R. 240.

(*a*) R. *v.* Hughes, 7 B. & C. 708. In Ward *v.* The Society of Attorneys, 1 Coll. 370, an injunction was granted to restrain the majority from accepting a new charter. See *Ex parte* The Society of Attorneys, 8 Ch. 163, for the grounds on which the grant of a supplemental charter can be successfully opposed.

(*b*) Dr. Askew's case, 4 Burr. 2200, *per* Yates, J.

(*c*) See The Society of Practical Knowledge *v.* Abbott, 2 Beav. 559. As to giving effect to the practice of the members and allowing that to control the charter, see Somes *v.* Currie, 1 K. & J. 605.

facias (*d*); but although a charter which has not been thus annulled is to be treated as valid until the contrary is proved, there is apparently no rule to the effect that its validity is not to be disputed except in a formal proceeding instituted for the purpose of procuring its cancellation. (*e*)[1] At the same time those persons who have accepted or acted on a charter and treated it as valid cannot, unless in a proceeding to annul it, object that it was obtained from the Crown irregularly, or by the misrepresentation of themselves or their fellow-members, or of their predecessors. (*f*) Indeed, it is said, that neither those who have accepted a charter, nor their successors, can dispute its validity; but this is very doubtful. (*g*)

Charters how obtained.

* Charters are obtained by petitioning the *152 Queen in Council. The petition and draft of the proposed charter are left at the Council Office, and are then referred to the Board of Trade. The Colonial Office, Foreign Office, and India Office are also referred to, if the proposed company falls within their departments. If it is determined that a charter shall be granted, it issues under the great seal. (*h*) But charters are now very seldom granted.

A charter may be surrendered to the Crown; but a surrender is of no effect unless accepted and enrolled in Chancery. (*i*) After the surrender has been accepted and enrolled the corporation ceases to exist. (*k*)

(*d*) R. *v.* The Eastern Archipelago Co. 1 E. & B. 310; 2 ib. 856; and 4 De G. M. & G. 199. See, as to *sci. fa.* to repeal patents, 2 Wms. Saund. 72, *u*, *et seq.*

(*e*) Grant on Corp. 39, &c.

[1] A party who has contracted with a corporation *de facto*, is never permitted to allege any defect in its organization, as affecting its capacity to contract or sue; but all such objections, if valid, are only available on behalf of the sovereign power of the State. Ramsey *v.* Ins. Co. 55 Ill. 314; Stone *v.* Gt. Western Oil Co. 41 Ill. 85; Palmer *v.* Lawrence, 3 Sandf. 161.

The regularity of the organization of a corporation *de facto* can not be questioned collaterally. Thompson *v.* Candor, 60 Ill. 244; Rice *v.* R. I. etc. R. R. Co. 21 Ill. 93; Tarbell *v.* Page, 24 Ill. 46; Baker *v.* Backus, 32 Ill. 79.

(*f*) See Macbride *v.* Lindsay, 9 Ha. 574.

(*g*) See Grant 20-22.

(*h*) See Wordsworth on Joint Stock Companies, p. 401, ed. 10; see, as to advertisements, 7 Will. 4 & 1 Vict. c. 73, § 32.

(*i*) See R. *v.* Osbourne, 4 East, 326.

(*k*) Grant, 46.

2. *Companies formed under the Letters Patent act, 7 Will. 4 & 1 Vict. c. 73.*

Companies governed by the Letters patent act.

Letters patent and charters are both *literæ patentes* sealed with the great seal, and are, in fact, the same thing. But the Crown is empowered by the act 7 Will. 4 & 1 Vict. c. 73 (*l*) to grant by letters patent to any company or body of persons, *although not incorporated* by such letters patent, any privileges which the Crown might at common law grant to any company or body of persons by any charter of incorporation. Letters patent under this act are obtained on application to the Queen in Council, and notice of the application must be inserted three times in the "London Gazette," and in one or more of the newspapers, circulating in the county in which it is proposed that the principal place of business of the company shall be established, at intervals of not less than one week. (*m*)

Company's deed.

Every company formed under this act, is required to be entered into by agreement under seal, in which are to be specified the number of shares in the company, the name of the company, the names of its members, the date of its commencement, the nature of its business, the place or principal *153 * place where such business is to be transacted, and also the name of two or more officers to sue or be sued on behalf of the company. (*n*) Within three months after the grant of the letters patent, a return is to be made to the Chancery enrollment office (*o*) of all the above particulars, and of the date of the letters patent (*p*); and returns are required to be made of every change made in the company's principal place of business, and of every change amongst its shareholders (*q*), and of the officers by which it is to be sued. (*r*) These returns are directed to be registered and to be open to the inspection of any person upon payment of a small fee. (*s*) A certified copy of the return is made evidence both in civil and in criminal proceedings. (*t*)

(*l*) Repealing 6 Geo. 4, c. 91, § 2, and 4 & 5 Will. 4, c. 94.
(*m*) 7 Will. 4 & 1 Vict. c. 73, § 32.
(*n*) *Ib.* § 5.
(*o*) In the case of an English company, see § 26.
(*p*) *Ib.* § 6.
(*q*) *Ib.* §§ 7 to 10.
(*r*) *Ib.* § 13.
(*s*) *Ib.* § 17.
(*t*) *Ib.* § 18; see, too, §§ 20 and 21.

Companies formed under this act are not corporations, but are essentially partnerships. Their privileges depend on the letters patent obtained by them. The possession of a common seal is taken for granted in the act itself (*u*); but there is nothing requiring the seal to be affixed to a contract, in order to bind the company; and the act is express that the members of the company are to be liable to its debts and engagements, except so far as that liability may be limited by the letters patent. (*x*)

Such companies not corporations.

Who are to be deemed members is not stated; that question therefore must depend in each case upon the provisions of the deed of settlement, and of the letters patent by which the particular company in question may be governed; but when once a person has become a member, his liability as a member continues, until a return of the means whereby he has ceased to be one is registered. (*y*)

The act does not state with any precision how shares are to be transferred, but a transfer, by deed or writing, is evidently contemplated. (*z*)

This act is seldom had recourse to; the modern registration acts having practically superseded it.

*CLASS III.—COMPANIES INCORPORATED OR PRIVILEGED BY SOME SPECIAL ACT OF PARLIAMENT. *154

1. *Companies not incorporated, but empowered to sue and be sued.*

These companies are formed by agreement, and by the acts which privilege them (*a*). Whether a person is a member or not, depends, in the absence of any special provisions in the act of the company which may be in question, upon the principles applicable to ordinary partnerships.

Companies empowered to sue and be sued.

(*u*) See § 27.
(*x*) See §§ 2–4 and 24.
(*y*) See § 21.
(*z*) See §§ 8 and 9
(*a*) As to companies empowered by a colonial legislature to sue and be sued by a public officer, see Bank of Australasia *v.* Harding, 9 C. B. 661; Bank of Australasia *v.* Nias, 16 Q. B. 717; Kelsall *v.* Marshall, 1 C. B. N. S. 241.

Banking companies governed by 7 Geo. 4, c. 46, may be regarded as the type of companies empowered to sue and be sued, and the authorities which will be referred to hereafter, in connection with that act may be usefully consulted upon questions arising upon special acts of a similar description.

2. *Incorporated companies.*

Companies incorporated by special act of parliament.

A company incorporated by a special act of Parliament exists as an incorporated company by virtue of that act, and not otherwise. It is formed by the act, and by that alone, and those only are members of the company who are made so by the act. It has already been seen that persons associated together for the purpose of obtaining an act of Parliament to incorporate them into a company, are not partners, although the company, when formed, will have gain for its object, and although the shareholders will divide amongst themselves whatever profits may accrue to the company. (*b*)

Parliamentary contract and subscribers' agreement.

It does not fall within the scope of the present work to detail the method of obtaining acts of Parliament, or to advert to the rules which have to be observed in compliance with the standing orders of the two houses (*c*). It *155 may, however, be observed *that before an act can be obtained for the incorporation of a company, a deposit must be made of a certain proportion in some cases of the estimated expense of the undertaking, and in others of the captital it is proposed to raise. Formerly a contract had to be entered into by the subscribers, whereby each covenanted to pay a sum set opposite his name. This contract was commonly called the "parliamentary contract," by way of distinction from the "subscribers' agreement," *i. e.*, the agreement entered into by the allottees of shares for the formation of the company.

The special act.

The act which each company may succeed in obtaining for itself is called its "special act," and governs the company as to all matters specially provided for in it. But as to

(b) *Ante*, pp. 31, *et seq.*

(c) The standing orders are published annually, and reliance is not to be placed on any except the last for the time being. See on this subject generally Hodges on Railways, c. i. ed. 6; and as to the application of the deposit in payment of debts, Bradford Tramways Co. 4 Ch. D. 18.

other matters the company (if incorporated since the 8th of May, 1845), is governed by the Companies clauses consolidation act (*d*), which is a public general act passed in May, 1845, and is applicable to every English (*e*) company incorporated by act of Parliament since that time, save so far as its clauses and provisions may be expressly varied or exempted by the company's special act. In the present place it is proposed to notice such of the clauses of the act in question as relate to the constitution of the companies to which it applies, and to the evidence of membership therein.

The Companies clauses act.

A company is supposed to be incorporated by a special act, to have the amount of its capital fixed thereby, and to have the capital thus fixed, divided into shares of a certain number and amount, and numbered progressively from one upwards, so that each share may be distinguished by its appropriate number (§ 6). The company is then (by § 9), required to keep a book called the "register of shareholders," in which book are to be entered, (1), the names of the persons entitled to shares in *the company; *156 (2), the number of shares to which such persons are respectively entitled; (3), the distinguishing numbers of such shares; and, (4), the amount of the subscriptions paid on them. This book is to be authenticated by the seal of the company (which is to be affixed at ordinary meetings), and is *primâ facie* evidence against a person registered therein as a shareholder that he is so in point of fact (see § 28); and the creditors of the company have a right to inspect it (§ 36). In addition to the "register of shareholders," the company is required to keep a "shareholders' address book" (§ 10), which is to be open to the inspection of every shareholder at all convenient times. On demand of the holder of any share, and on payment of a small fee, the company is required (§ 11) to deliver to him under its seal a certificate of proprietorship; and this certificate is (§ 12) required to be admitted in all courts as *primâ facie* evidence of the title of the person named in it, and of his executors, administrators, or assigns to the share therein specified. (*f*) Provision is

Register of shareholders.

Share certificate.

(*d*) 8 & 9 Vict. c. 16, amended by 26 & 27 Vict. c. 118, and 32 & 33 Vict. c. 48. The Land clauses and the Railway clauses act, have no connection with the topics discussed in this treatise.

(*e*) See Wilson *v.* Caledonian Rail. Co. 5 Ex. 822.

(*f*) The certificate only shows the legal title, Shropshire Union Rail. Co. *v.* R. L. R. 7 H. L. 496.

then made for the transfer of shares, for the registry of transfers, for the payment of calls, for the forfeiture of shares for the non-payment of calls, and for executing against shareholders judgments which have been obtained against the company; all of which matters will be noticed hereafter.

Who are shareholders.

The statute contains two definitions of the term shareholder:

1. It is declared in § 3, that the word shareholder shall mean shareholder, proprietor, or member of the company; and,

2. It is declared in § 8, that every person who shall have subscribed the prescribed sum (*g*) or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, *and* whose name shall have been entered on the register of shareholders, shall be deemed a shareholder of the company.

Upon this section it has been decided that a person may be a shareholder although he has not paid for his shares, and *157 *although payment is a condition precedent to his exercising his full rights. (*h*)

Effect of Register.

As regards the entry on the register, it is to be observed:—

1. The act nowhere says that a person not on the register is not a shareholder. A person made a member by the special act is clearly a shareholder although not registered (*i*); and it is conceived that other persons may be shareholders although not registered as such. (*k*)

2. The register is *primâ facie* evidence that a person whose name is on it is a shareholder.

It follows from this, that the company may put anybody's name on the register, and throw upon him the burden of showing that he is not a shareholder. (*l*) But the register is no evidence that a person whose name is not on it is a shareholder; and therefore, where

(*g*) *i. e.* the sum prescribed in the company's special act, see § 2.

(*h*) East Gloucestershire Rail. Co. *v.* Bartholomew, L. R. 3 Ex. 15, and see, also, McEwen *v.* West Lon. Wharves Co. 6 Ch. 655.

(*i*) Portal *v.* Emmens, 1 C. P. D. 201 & 664, where no shares were ever issued, and no register was ever kept. O'Brien's case, Ir. R. 11 Eq. 422.

(*k*) See the last note, and Rastrick *v.* Derbyshire, &c. Rail. Co. 9 Ex. 149, and Wolverhampton Waterw. Co. *v.* Hawkesford, 6 C. B. N. S. 336, 7 ib. 795, and 11 ib. 546.

(*l*) Waterford, Wexford, &c. Rail. Co. *v.* Pidcock, 8 Ex. 279; Bain *v.* Whitehaven Rail. Co. 3 H. L. C. 1; West Cornwall Rail. Co. *v.* Mowatt, 15 Q. B. 528.

shares were allotted to "Brownrigg and Taylor," who were trustees for another person, and were described on the register as "Brownrigg and others," this entry was held to be no evidence whatever against Taylor. (*m*)

Form of Register.

The leading case on the requisites of a register of shareholders in companies governed by the Companies clauses consolidation act, is Wolverhampton New Water Works Company *v.* Hawkesford. (*n*) It was there held that a sheet of paper on which were written the names of some shareholders, and the total number of shares held by them, and which paper was sealed with the seal of the company, was not a register at all. In this case the shares were not identified by numbers, and in this respect the register was substantially informal; and the *Court relied much *158 on this circumstance. But it would, perhaps, be going too far to hold that if a company issues unnumbered shares, and keeps a proper register of such shares, this register is altogether useless and inadmissible in evidence. (*o*) And if the shares are numbered the register is admissible, although it does not contain the numbers of the shares. (*p*)

A rough share book has been held inadmissible in evidence as a register under the act now in question. (*q*)

If the register is in several volumes, they are all admissible in evidence, although the company's seal is to be found in the last of them only (*r*); and the register sealed with the seal of the company is admissible in evidence without proof of the time or place, or authority at or by which the seal was affixed. (*s*) Moreover, the register is, if sealed and kept substantially as required, *primâ facie* evidence against any one whose name is on it, although he may prove that it has been kept irregularly, and is in many respects inaccurate and imperfect; (*t*) but the sealed register is no evidence

(*m*) Birkenhead, Lancashire, &c. Rail. Co. *v.* Brownrigg, 4 Ex. 426.

(*n*) 6 C. B. N. S. 336, 7 ib. 795, and 11 ib. 546. Compare Portal *v.* Emmens, 1 C. P. D. 201 & 664.

(*o*) See the last case, and Irish Peat Co. *v.* Phillips, 1 B. & Sm. 638.

(*p*) East Gloucestershire Rail Co. *v.* Bartholomew, L. R. 3 Ex. 15.

(*q*) Birkenhead, &c. Rail. Co. *v.* Brownrigg, 4 Ex. 426; Cheltenham, &c. Rail. Co. *v.* Price, 9 C. & P. 55.

(*r*) Inglis *v.* The Great Northern Rail. Co. 1 Macqueen, 122.

(*s*) North-Western Rail. Co. *v.* M'Michael, 5 Ex. 855.

(*t*) See East Gloucestershire Rail Co. *v.* Bartholomew, L. R. 3 Ex. 15; Bain *v.* Whitehaven Co. 3 H. L. C. 1; Southampton Dock Co. *v.* Richards, 1 Man. & Gr. 448; London and Grand Junc. Rail Co. *v.* Freeman, 2 ib. 606; London

that a person whose name is on it was a shareholder at any given time anterior to the day on which the seal was affixed. (*u*)

Register not conclusive.

3. The register is not conclusive evidence that a person whose name is on it is a shareholder. It is competent for him to rebut the *primâ facie* case made against him by the register, by showing that the company inserted his name in it without any authority. An express authority from him is not, however, requisite; for if he has entered into a contract with the *159 *promoters of the company to take shares in it, and if that contract is binding upon both parties, he may without more be properly registered as a shareholder, and the contract and the register will together be conclusive against him. But if he can show that no such contract was ever entered into, or that such a contract, if ever entered into, had terminated before his name was inserted in the register, then the *primâ facie* case raised against him by it will be at an end. The following cases illustrate these propositions:

Right of company to register.

1. As to the right of the company to register those who are entitled to shares. That a person who is bound to accept shares may be properly registered as a shareholder, was decided in The Midland Great Western Railway Company *v.* Gordon. (*x*) In that case a railway company was projected; the defendant agreed to take shares in it; he executed the subscribers' agreement; and he received scrip certificates. He sold the scrip before the company was incorporated. After it was incorporated the company placed his name on the register of its shareholders, and he was held to be a shareholder, although he had never authorized the insertion of his name in the register, except so far as his contract conferred an implied authority for such insertion. (*y*) But a person who has never agreed to take shares, and who is only

and Brighton Rail. Co. *v.* Fairclough, ib. 674; Birmingham, Bristol and Thames Junc. Rail. Co. *v.* Locke, 1 Q. B. 256; London and Grand Junc. Rail. Co. *v.* Graham, ib. 271.

(*u*) Cheltenham and Great Western Union Rail. Co. *v.* Price, 9 C. & P. 55.

(*x*) 16 M. & W. 804; see, too, Burke *v.* Lechmere, L. R. 6 Q. B. 297; Nixon *v.* Brownlow, 2 H. & N. 455, and 3 ib. 686; Cork and Youghal Rail. Co. *v.* Paterson, 18 C. B. 414.

(*y*) In Kidwelly Canal Co. *v.* Raby, 2 Price, 93, an act of Parliament, incorporating the subscribers to a company, was held to have made the defendant a shareholder, he having been a subscriber, although, before the act had passed, he retired from his contract so far as he lawfully could.

the holder of scrip transferable to bearer, ought not to be registered as a shareholder against his will. (*z*)

2. As to the inconclusiveness of the register. A person whose name is on the register is not a shareholder unless he is also entitled to a share in the company; and in order to entitle a person to a share, he must have acquired such title by the company's special act (*a*), or he must have been an original subscriber for the share, or have obtained a title to it *from or through an original member or subscriber. An original subscriber does not become a shareholder by being placed on the register unless he has acquired a right to be registered; and therefore if he has entered into a contract which gives him no right against the company to be considered a member thereof until he has performed certain conditions *e. g.*, executed a deed, he does not become a shareholder by being registered as one before he has complied with those conditions; for as the registry would not be equivalent to a compliance with the conditions for one purpose, *e. g.*, as against the company if a dividend were claimed, so it is not equivalent to a compliance with them for another purpose, *e. g.*, against him who is registered, in an action for calls. (*b*)

Improper registry.

*160

A person who is not yet entitled to share dividends is not a shareholder in the company, and does not become one by simply being put on the register, unless indeed the insertion of his name there is the only one thing remaining to be done to perfect his title. (*c*)

It follows from the above that the company is not estopped by its own register. (*d*) But when a person is put on the register, the company has no right to strike him off unless it can show proper grounds for so doing. (*e*)

Company not estopped by its register.

The Companies clauses consolidation act contains no provision for the rectification of the register; but it may never-

Correcting register.

(*z*) Eustace *v.* Dublin Trunk, &c. Rail Co. 6 Eq. 182.

(*a*) As in Portal *v.* Emmens, 1 C. P. D. 201 and 664.

(*b*) Waterford, Rexford, &c. Rail. Co. *v.* Pidcock, 8 Ex. 279; Carmarthen Rail Co. *v.* Wright, 1 Fos. & Fin. 282. See, also, Irish Peat Co. *v.* Phillips, 1 B. & Sm. 598, noticed *ante*, p. 131, and Edwards *v.* Kilkenny Rail Co. 14 C. B. N. S. 526.

(*c*) See Shropshire Union Co. *v.* Anderson, 3 Ex. 401.

(*d*) See the last case, and Waterford, Wexford, &c. Rail Co. *v.* Pidcock, 8 Ex. 279. See, also, *ante*, p. 141.

(*e*) Ward *v.* S.-Eastern Rail Co. 2 E. & E. 812. Compare Hare *v.* Lond. and N.-W. Rail. Co. Johns. 722.

theless be rectified both by mandamus and injunction, as already pointed out. (*f*)

Estoppel by conduct.

The doctrine by which individuals and companies are estopped by their own conduct from taking advantage of the non-performance of conditions precedent, and the non-observance of prescribed formalities, is applicable to companies of the class now in question, and to shareholders in *161 *them, as is shown by the cases of Sheffield & Manchester Railway Co. *v.* Woodcock (*g*), and Cheltenham and Great Western Railway Co. *v.* Daniel (*h*), which have been already noticed. (*i*)

Transfers of shares.

Shares in companies governed by the Companies clauses consolidation act are transferable by deed; a form of transfer is given by the act (*k*); and in order that a company may be compelled to register an instrument of transfer, it must be in a simple form, not differing substantially from the form prescribed. (*l*)

CLASS IV.—COMPANIES INCORPORATED OR PRIVILEGED BY A GENERAL ACT OF PARLIAMENT.

1. *Banking companies formed under 7 Geo. 4, c. 46.*

Banking companies, 7 Geo. 4, c. 46.

Banking companies governed by 7 Geo. 4, c. 46, and formed before May, 1844, still exist, but no company can now be formed under that act. (*m*) These companies are not mere partnerships, for they possess many privileges which ordinary partnerships do not. (*n*) A company of this kind was formed by agreement, and the privileges alluded to were acquired by sending returns to the stamp office, of (*inter alia*) the names and residences of the members; and the names, residences, and titles of office of two or more members resident in England, who had been appointed public officers of the company, and by any one of whom the company might sue and be sued. (*o*) The returns thus made are

(*f*) *Ante*, p 142.
(*g*) 7 M. & W. 574.
(*h*) 2 Q. B. 281.
(*i*) *Ante*, p. 131.
(*k*) 8 & 9 Vict. c. 16, § 14, and Sched. B.
(*l*) Copeland *v.* North-Eastern Rail. Co. 6 E. & B. 27, and ib. 277; R. *v.* General Cemetery Co. ib. 415.
(*m*) 7 & 8 Vict. c. 113, § 1.
(*n*) Powles *v.* Page, 3 C. B. 16; Macintyre *v.* Connell, 1 Sim. N. S. 225, 252.
(*o*) 7 Geo. 4, c. 46, §§ 4 & 5; an ir-

evidence that all persons named therein as members were members at the dates of the returns in which their names appear. (*p*)

The act contains no definition of the term shareholder or member; but it has been decided that no person is a member *within the meaning of the act unless he has complied with all the conditions necessary to constitute a person a member according to the company's deed of settlement. Thus it has been held that the husband of a married woman who, with his consent had become a shareholder, was not himself liable to creditors as a member, he not being a member according to the company's deed. (*q*) *162 Who are shareholders.

The act requires that the returns to the stamp office shall be made out and be verified by the oath of one of the registered public officers, and shall be sent in once a year, between the 28th of February and the 25th of March. (*r*) But it has been held that a certified copy of the return is admissible in evidence, although it may have been made out by a person calling himself "cashier," and there may be nothing to show that he was a public officer. (*s*) It has also been held unnecessary to prove that the return was verified by the oath of a public officer, as required by the act (*t*); or that the return was made at the proper time. (*u*) On the other hend, it has been held that returns proved not to have been made in compliance with the act are inadmissible; *e. g.*, when it is proved that they were not made until after the 25th of March. (*x*) Returns to the stamp office.

A person returned as a member will, until the contrary is shown, be presumed to have been a member at the time the return was made and subsequently (*y*); and if two successive returns contain the name of the same person, the presump- Effect of return.

regularity in the returns does not deprive the company of the privileges conferred by the act; Bonar *v.* Mitchell, 5 Ex. 415.

(*p*) 7 Geo. 4, c. 46, § 6.

(*q*) Ness *v.* Angas, 3 Ex. 805; see, too, Dodgson *v.* Bell, 5 Ex. 967; Ness *v.* Armstrong, 4 Ex. 21; Bosanquet *v.* Shortridge, 4 Ex. 699. These cases will be adverted to hereafter.

(*r*) 7 Geo. 4, c. 46, § 5.

(*s*) Harvey *v.* Scott, 11 Q. B. 92; Field *v.* Mackenzie, 4 C. B. 717.

(*t*) Steward *v.* Dunn, 12 M. &. W. 655.

(*u*) Bosanquet *v.* Woodford, 5 Q. B. 310.

(*x*) Prescott *v.* Buffery, 1 C. B. 41; compare this with the last case, where it was held that the act was directory only in this respect.

(*y*) Steward *v.* Dunn, 12 M. & W. 655; *Ex parte* Prescott, Mon. & Ch. 611; Harvey *v.* Scott, 11 Q. B. 106.

tion is strong that he was a member during the whole period between the times at which such returns were made. (*z*)

There is nothing in the act which makes the returns con-
*163 clusive either one way or the other; and a person not *returned as a member may be proved, not only to have become a member since the making of the last return, but to have been a member at the time of the making of that return. (*a*)

The act is silent as to the mode in which shares are to be transferred.

2. *Registered companies.*

By far the greatest number of joint-stock companies belong to this class. They are all now governed by the Companies acts, 1862, 1867 and 1877, which are the only acts relating to this subject at present in force. These acts, like those which they supersede, require for their practical working, a public officer in each division of the United Kingdom. This officer (called the registrar of joint-stock companies) is appointed by, and, to a certain extent, is subject to the Board of Trade. His duty is to register the various documents required by the acts to be registered, and to allow such documents to be inspected by any one desirous of seeing them (25 & 26 Vic. c. 89, § 174).

These duties will, if necessary, be enforced by mandamus. (*b*)

Registration incorporates the company (§§ 18, 191, and 192); and the registrar's certificate of registration, which he is required to give, is conclusive evidence that all the statutory requisitions have been complied with (§§ 18 and 182). (*c*) Even therefore if they have not, still the existence of the company as a corporate body cannot be denied in the face of the certificate (*d*); nor does the fact that a company was formed in fraud invalidate the certificate or deprive the company of its

Incorporation of company.

(*z*) Bosanquet *v.* Shortridge, 5 Ex. 699.

(*a*) See Prescott *v.* Buffery, 1 C. B. 41; Bank of England *v.* Johnson, 3 Ex. 598.

(*b*) R. *v.* Whitmarsh, 15 Q. B. 600; see, also, R. *v.* Registrar of Joint Stock Companies, 10 Q. B. 839.

(*c*) Peel's case, 4 Ch. 674; Oakes *v.* Turquand, L. R. 2 H. L. 325, 354–369; Princess of Reuss *v* Bos, 5 ib. 176; New Brunswick Rail. Co. *v.* Boore, 3 H. & N. 249. See as to copies of certificates, 40 & 41 Vict. c. 26, § 6.

(*d*) See the last note, and Nassau Phosphate Co. 2 Ch. D. 610; Banwen Iron Co. *v.* Barnett, 8 C. B. 406; Bird's case, 1 Sim. N. S. 47.

corporate character. (*e*) There is, moreover, no provision for *cancelling the registration of an improperly registered *164
company nor is there apparently any means of cancelling such registration. (*f*)

But the registrar has no power to extend the acts to companies not within their scope; and in order that his certificate may be conclusive evidence of the incorporation of a company registered under them, it is essential that the company shall be one which may be duly registered; neither registration nor the registrar's certificate is of any avail in the case of a company to which the acts do not apply. (*g*)

Certificate of registration when not conclusive.

The registrar's certificate, although the best, is not the only admissible evidence of registration. Registration may be sufficiently proved by other evidence; for example, as against the company, by the production of certificates of shares sealed with its seal. (*h*) But this sort of evidence cannot be relied upon when it is necessary to prove the incorporation of the company against persons not connected with it. (*i*)

Evidence of incorporation.

No two companies are to be registered by the same name, or by names so similar to each other as to be calculated to deceive (§ 20). (*k*) But if a registered company is being dissolved, and it consents to the assumption of its name by another company, the latter may be registered under the name borne by the former (§ 20). (*l*) In the event of two companies being inadvertently or otherwise registered by the same name or by the two names so similar as to be calculated to deceive, the name of the company last registered may be changed (§ 20). And any registered company may change its

Name of company.

Power to change name.

(*e*) Pilbrow *v.* Pilbrow's Atmospheric Co. 5 C. B. 440.

(*f*) Princess of Reuss *v.* Bos, L. R. 5 H. L. 176, 193, 197, 202.

(*g*) See Northumberland District Banking Co. 2 De G. & J. 357. Compare Princess of Reuss *v.* Bos, *ubi sup.*

(*h*) Mostyn *v.* Calcott Hall Mining Co. 1 Fos. & Fin. 334. See Agricultural Cattle Insurance Co. *v.* Fitzgerald, 16 Q. B. 432, as to actions by the company. The fact of registration is there stated to have been proved, but how does not appear. The certificate, however, was not produced.

(*i*) See R. *v.* Frankland, L. & C. 276, as to the proof required in criminal cases, and compare R. *v.* Langton, 2 Q. B. D. 296.

(*k*) See R. *v.* Registrar of Friendly Societies, L. R. 7 Q. B. 741.

(*l*) Advantage is taken of this when it is desired to reconstruct a registered company. The company dissolves, and a new company is formed with a new constitution, but with the same name as the old company.

*165 name, with the sanction *of a special resolution of its members, and the approval of the Board of Trade (§ 13). But the change of name is not complete until a new certificate of incorporation has been issued. (*m*)

It is further provided that such existing companies as register with limited liability, shall add the word limited to their former name (§ 183, cl. 3, and § 190). But except in cases specially provided for, a company once registered under a given name cannot require to be registered under a new name. (*n*)

A mere change of name does not affect a company's rights or obligations (§§ 13, 20, and 194). But as will be seen hereafter, the consequences of registering an existing company under the acts are extremely important.

With respect to the registration of companies under the act of 1862, it will be found that its provisions apply, first to all companies formed under it (*o*); secondly, to some companies existing when the act came into operation (*p*); and, thirdly, to some companies to be formed subsequently to that date, but not under the provisions of the act itself. (*q*) It will further be seen that many companies may be wound up under it although not registered under it. (*r*)

Registration is compulsory—

Registration when compulsory.

1. In the case of insurance companies completely registered under 7 & 8 Vict. c. 110 (see § 209 of the act of 1862). (*s*)

2. In the case of companies which ought to have registered under the repealed acts of 1856–1858, but which were not so registered. (§ 209). This class includes, 1, all companies registered under 7 & 8 Vict. c. 110, except insurance companies (*t*); 2, all *166 chartered banking companies formed under 7 & 8 Vict. *c.

(*m*) Shackleford *v.* Dangerfield, L. R. 3 C. P. 407. Although the Board of Trade may sanction a change of name, the writer apprehends that it cannot sanction the conversion of an unlimited into a limited company.

(*n*) R. *v.* Registrar of Joint-Stock Cos. 10 Q. B. 839.

(*o*) See the first four parts of the act.

(*p*) See the sixth and seventh parts of the act.

(*q*) See § 180.

(*r*) See part eight of the act.

(*s*) This gets rid of London Monetary Co. *v.* Smith, 3 H. & N. 543, and Lond. and Provincial Prov. Soc. *v.* Ashton, 12 C. B. N. S. 709. The first of these cases was clearly wrong.

(*t*) See 20 & 21 Vict. c. 14, §§ 26 and 27. As to insurance companies, see the cases in the last note, and Bank of London, &c. Ins. Assoc. 6 Ch. 421.

113; and, 3, Scotch and Irish banking companies formed under 10 Vict. c. 75. (*u*)

3. In the case of banking partnerships of more than ten persons, formed on or after the 2d of November, 1862, unless formed under some other act of Parliament, or under letters patent (§ 4).

4. In the case of companies, associations, or partnerships of more than twenty persons, formed on or after the 2d of November, 1862, for the purpose of carrying on any other business (except banking) for gain (*x*), unless they are formed under some other act of Parliament, or under letters patent, or unless they are companies engaged in working mines within and subject to the jurisdiction of the Stanneries (§ 4). (*y*)

Registration appears to be impossible only in two cases, viz.: Registration, when impossible.

1. In the case of companies and associations of less than seven members (§ 6); and

2. In the case of companies and associations having the liability of their members limited by act of Parliament or letters patent, and not having a capital divided into shares or a transferable stock (§ 179, cl. 1, and § 181), *e. g.* mutual incorporated societies, and learned societies, such as the Royal Society.

3. In the case of Trade Unions. (*z*)

Companies which had been already registered under the repealed acts of 1856–8 need not register under the act of 1862, but they may do so; and whether they do or do not register they are subject to its provisions, except that their own regulations remain unchanged (compare §§ 176, 177, 206, 208). (*a*) For some purposes (see §§ 176, 177), however, a distinction is made, in the case of non-re-registration, between companies formed and registered under the acts of 1856–1858, and those registered but not formed under them. The former class are placed substantially on the same footing as companies formed and registered under the act of 1862, the *old regulations being *167 preserved (§§ 176 and 206); whilst the latter class are placed Companies already registered under the acts of 1856–8.

(*u*) See 20 & 21 Vict. c. 49, §§ 4 and 5.

(*x*) This includes mutual marine insurance societies, *Ex parte* Hargrove, 10 Ch. 542.

(*y*) The jurisdiction was extended to Devonshire by 18 & 19 Vict. c. 32.

(*z*) 34 & 35 Vict. c. 31, § 5.

(*a*) See Torquay Bath Co. 32 Beav. 581. Of course without registration such a company cannot be converted from an unlimited into a limited company.

on the same footing as other existing companies which have registered under the act of 1862 (§ 177).

The other clauses which authorize, but do not imperatively require, registration, are the 6th and the 180th. These apparently authorize any seven or more persons, associated for any lawful purpose, to form a company by registration with the exceptions above mentioned. (*b*) The circumstance that the persons are foreigners and intend to carry on business abroad does not preclude registration. (*c*)

Registration when optional.

With a few exceptions, every company capable of being registered may, at the option of its members or promoters, be registered either with or without limited liability (§§ 6 and 180); and, in the first case, with the liability limited either by shares or by guarantee (§§ 7 and 180). The exceptions are as follows:

Option to register with limited liability, or without.

1. No company, having the liability of its members limited by act of Parliament or letters patent, can register as an unlimited company, or as a company limited by guarantee (§ 179, cl. 2).

2. No company that has not a capital divided into shares, or a transferable stock, can register as a company limited by shares (§ 179, cl. 3, and § 181). This applies to most cost-book mining companies.

Further, a company can be formed with limited liability, but with the liability of its directors or managers unlimited. (*d*)

Having made these preliminary observations, it is proposed to consider the formation of registered companies and the evidence by which a person can be shown to be a member of them. For this purpose, it is not necessary to distinguish limited from unlimited companies, but it is necessary to divide registered companies into

1. Companies formed and registered under the act of 1862.

2. Companies registered under that act but not formed under it.

(*b*) The joint effect of § 179, cl. 1, and of §§ 180 and 181, seems to be that railway companies incorporated by act of Parliament, and having a capital divided into shares or a transferable stock, may be registered under the act. This was probably not intended.

(*c*) Princess of Reuss *v.* Bos, L. R. 5 H. L. 176, affirming General Co. for Promoting Land Credit, 5 Ch. 363.

(*d*) 30 & 31 Vict. c. 131, § 5.

*1. *Companies formed and registered under the Companies Act, 1862.* *168

Any seven or more persons associated for any lawful purpose may form a company under this act (§ 6). It is not even necessary that gain shall be the object of the company. (*e*)

A company is formed under the act of 1862, by the registration of a memorandum of association, bearing a deed stamp, and subscribed by seven or more persons, in the presence of, and attested by one witness at least (see §§ 8–11 and 17 and 18, and the forms in sched. 2). Memorandum of association.

This memorandum must contain, 1, the name of the proposed company; 2, the part of the United Kingdom in which the registered office of the company is to be; and, 3, the objects for which the company is to be established (§§ 8–10, and sched. 2). If the company is to be limited by shares, the memorandum must also state, 4, that the liability of the members is limited; and, 5, the amount of proposed capital, and the shares into which it is to be divided (§ 8, and sched. 2, form A.). If the company is to be limited by guarantee, the memorandum must contain, in addition to the three things first above mentioned, a declaration that each member will, if necessary, contribute to a specified amount on the winding up of the company (§ 9, and sched. 2, forms B. and C.). If the company, whether limited or unlimited, has a capital divided into shares, each subscriber to the memorandum must write opposite his name, the number of shares he takes, and he must take one at least (§§ 8 and 14).

The memorandum of association must, in the case of an unlimited company, and of a company limited by guarantee, and may, in the case of a company limited by shares, be accompanied, when registered, by articles of association, prescribing *regulations for the company (§ 14, and sched. 2, forms B. and C.). These articles must be printed and be *169 Articles of association.

(*e*) See 30 & 31 Vict. c. 131, § 23. No questions, therefore, can arise under the act of 1862, similar to those which arose under 7 & 8 Vict. c. 110. See as to the application of that act to projected railway companies. Abbott *v.* Rogers, 16 C. B. 277; to companies not having gain for their object, R. *v.* Whitmarsh, 15, Q. B. 600; Bear *v.* Bromley, 18 ib. 271; Moore *v.* Rawlins, 6 C. B. N. S. 289; to companies, the formation of which was commenced before 1st Nov. 1844, Shaw *v.* Holland, 15 M. & W. 136.

stamped with a deed stamp, and be signed by the subscribers to the memorandum of association, in the presence of, and attested by one witness at least (§§ 14 and 16). In the case of a company having a capital divided into shares, and not being limited by shares, the articles must state the amount of the proposed capital; and in the case of a company not having such a capital, the articles must state the number of members with which the company proposes to be registered (§ 14).

Table A.

The first schedule of the act, table A., contains a set of regulations which may be adopted, wholly or in part, by any company, and which apply to companies limited by shares, unless the contrary is expressed in their registered articles (§§ 14 and 15). These regulations closely resemble those contained in table B., in the repealed act of 1856. They have evidently been framed with care, and they should be adopted, as far as possible, in all cases. The Board of Trade has power to alter them, but not retrospectively (§ 71.)

Registration of memorandum and articles.

The memorandum of association and the articles, if any, are to be delivered to the registrar of joint-stock companies, who is required to retain and register them (§ 17). Certain fees are payable upon their registration (§ 17). After their registration, the registrar is required to certify that the company is incorporated, and in the case of a limited company, that it is limited; and his certificate is conclusive evidence that all the requisitions of the act in respect of registration, have been complied with (§ 18). (*f*)

Certificate of registration.

Construction of memorandum and articles.

The memorandum of association and the articles of association ought to be consistent with each other, and they ought, if possible, to be construed so as to make them consistent. (*g*) But if the two conflict, the articles must give way to the memorandum, for that is the more important document of the two, and cannot be altered except in certain particulars specified in the statutes. (*h*) Many cases illustrating this general rule will be met with hereafter, when considering the powers of
*170 *directors and majorities, and the liabilities of the subscribers of the memorandum. (*i*)

(*f*) *Ante*, p. 163.

(*g*) See Felgate's case, 2 De G. J. & Sm. 456.

(*h*) See § 12 of the act of 1862, & §§ 8, 10, 21, of the act of 1867.

(*i*) See particularly Ashbury Rail. Carriage Co. *v.* Riche, L. R. 7 H. L. 653; Dent's case, 8 Ch. 776.

The act in substance declares that the subscribers of the memorandum of association (§§ 18 and 23), and all persons who have agreed to become members, and whose names are entered in the register of members, shall be deemed members of the company (§ 23). It is conceived that persons who sign copies of the memorandum before it is registered are members under this act, as they were held to be under the act of 1856. (*k*)

Who are members.

It is very difficult to see how any person who signs the memorandum of association can be held not to be a member. But in Felgate's case (*l*), a person who had signed the memorandum and articles of association was held not to be a contributory, as the articles he had signed had been tampered with before they were registered. He was held not to be bound by the articles, and not being bound by them, he was held not bound by the memorandum.

With respect to other persons it is to be observed that no particular form of agreement is necessary (*m*); but a question may arise on this act, as on the Companies clauses consolidation act, whether a person may not be a member, although his name is not on the register. In considering this question regard must be had to the right of companies to put persons on the register (*n*), to the provisions for its rectification (*o*), and to the extent to which a person may have acted and been treated as a member. (*p*)

A certificate under the seal of the company, specifying any shares or stock held by a member, is *primâ facie* evidence of his title to the shares or stock therein specified (§ 31). (*q*)

Certificate of title.

* Every company registered under the act is bound to keep at its registered office (§ 32) a register of its members; and the register must contain their names and addresses, occupations, and the number of shares, if any, held by them, and the amounts paid, or agreed to be considered as paid, in respect of such shares, and the dates at which the members were

*171

Register of members.

(*k*) New Brunswick Rail. Co. *v.* Boore, 3 H. & N. 249.

(*l*) 2 DeG. F. & J. 456. This case turned on the act of 1856, but there does not appear to be any difference between that act and the act of 1862, so far as this subject is concerned.

(*m*) This gets rid of New Brunswick Rail. Co. *v.* Muggeridge, 4 H. & N. 160 and 580. See Bog Lead Mining Co. *v.* Montague, 8 Jur. N. S. 310.

(*n*) *Ante*, p. 127.

(*o*) §§ 35 and 98.

(*p*) *Ante*, p. 128.

(*q*) The right to demand this certificate is not given by the act, but only by Table A, Nos. 2 and 3. See as to these certificates, *ante*, p. 145.

registered, and the dates at which they ceased to be members (§ 25). No notice of any trust is to be entered on the register (§ 30). The register is *primâ facie* evidence of all matters directed or authorized to be inserted therein (§ 37). (*r*)

Correction of register.

The 35th section provides for the rectification of the register, and is extremely important. (*s*) Its effect is that if the name of any person is without sufficient cause entered in or omitted from the register of members, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, he or any member of the company or the company itself may obtain an order for the rectification of the register. The order may be obtained from any division of the High Court.

A difference of opinion has been expressed as to the correct interpretation of this section. Some consider that under it the register may be rectified whenever it can be shown by any person who is on or off the register himself that some other person ought as between themselves to be in his place (*t*); whilst others consider that the section does not admit of so wide an interpretation, being confined to the cases specified in its commencement (*u*), viz:—

1. To cases where the name of a person is without sufficient cause entered in or omitted from the register.

2. To cases where default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company.

Correction of register under § 35.

*172 *The more restricted interpretation, it will be observed, renders the section inapplicable except where the company fails in discharging the duty imposed upon it of keeping a proper register; and the more extensive interpretation prevailed in the latest case decided by the Court of Appeal. (*v*)

It must be borne in mind that before a company is being wound up its register is much more readily rectified than after the winding up has commenced, and the rights of creditors have to be con-

(*r*) See, as to the register when fully paid-up shares have been replaced by share warrants transferable by delivery, 30 & 31 Vict. c. 131, § 31.

(*s*) See on the correction of registers generally, *ante*, pp. 142–143.

(*t*) See *Ex parte* Shaw, 2 Q. B. D. 463; Ward and Garfit's case, 4 Eq. 189; Musgrave and Hart's case, 5 Eq. 193; and the judgment of Turner, L. J., in Ward and Henry's case, 2 Ch. 431.

(*u*) *Ex parte* Ward, L. R. 3 Ex. 180; Shepherd's case, 2 Ch. 16; and see Lord Cairns' judgment in Ward and Henry's case, 2 Ch. 431; Marino's case, 2 Ch. 596.

(*v*) *Ex parte* Shaw, 2 Q. B. D. 463.

sidered. The rectification of the register in connection with the settlement of the list of contributories will be considered hereafter; in the present place those decisions only will be referred to which relate to the rectification of the register of a going company.

The 35th section not only authorizes the correction of mistakes but also the determination of important conflicting rights, going further in this respect than the corresponding section of the Companies act, 1856. (*w*) As however trusts are not noticed (§ 30) the title to be investigated is the legal title or the right to acquire it. (*x*) If this legal title is clear, and there is no difficult question of fact to be investigated, the Court will rectify the register without directing any action to be brought (*y*); but the Court has a discretion as to whether it will interfere summarily under the act or direct an action, and will be guided by the nature of facts in dispute and by the desirability of having them investigated by a jury. (*z*) The circumstance, however, that the company has itself rectified the register does not preclude the Court from ordering it to be rectified; an order of the Court being often of great importance to the applicant. (*a*)

Registers will be rectified at the instance of persons who have been registered as members without having entered into *any contract to take shares (*b*); so where the contract they have entered into is void (*c*); so where the contract being voidable it has been duly avoided by the alleged shareholder. Thus registers have been rectified where persons have taken shares on the faith of a prospectus with which the company's memorandum of association does not correspond (*d*); so where a person has been induced by the

*173 Instances of rectification.

(*w*) As to which, see British Sugar Refining Co. 3 K. & J. 408.

(*x*) *Ex parte* Sargent, 17 Eq. 273; Parker's case, 2 Ch. 685.

(*y*) *Ex parte* Shaw, 2 Q. B. D. 463.

(*z*) See the last case; Askew's case, 9 Ch. 664, where an action was directed to try a question of fraud; Simpson's case, 9 Eq. 91, where a bill was directed to be filed. The difficulty here mainly turned on the construction of documents, and *qu.* the advantage of directing an action in such a case.

(*a*) Martin's case, 2 Hem. & M. 669.

(*b*) Los' case, 6 N. R. 327; Higg's case, 2 H. & M. 657; Martin's case, ib. 659, where the name had been removed already; Baily's case, 5 Eq. 428; 3 Ch. 592; Somerville's case, 6 Ch. 266, 271.

(*c*) Stace and Worth's case, 4 Ch. 683.

(*d*) Stewart's case, 1 Ch. 574; Webster's case, 2 Eq. 741; Downes *v.* Ship, L. R. 3 H. L. 343, and Ship's case, 2 De G. J. & Sm. 544; Breckenridge's case, 2 Hem. & M. 642. See *ante*, p. 107.

fraud of the company to become a member (*e*); so where the company refuses to register a transferee, to whom the company cannot object. (*f*)

Again, where shares are transferred to an infant, the infant can have the register rectified whilst he is an infant (*g*), or on his coming of age, provided he has not accepted the shares (*h*); and the company itself can obtain an order rectifying the register in such cases (*i*) if it has not accepted the infant as a shareholder knowing the facts. (*k*) So where a person has by misrepresentation or fraud induced the company to register him as a shareholder, the register will be rectified at the instance of the company, if it applies promptly (*l*); and if third parties have not dealt with the person registered and have not acquired rights on the faith of his being a shareholder. (*m*)

So where shares intended to be issued as fully paid up, have been inadvertently issued as not paid up, the register has been rectified under this section. (*n*)

*174 *The question whether a vendor or a purchaser of shares is entitled to be registered in respect of them can also be determined upon an application to rectify the register. (*o*)

On the other hand, a duly registered member cannot have his name struck off the register (*p*); and no person is entitled to have his name put on the register until he has complied with all conditions precedent, *e. g.*, proved his title to his shares in the manner required by the company's regulations (*q*); and where a company is required to register a transfer of shares on which it has a lien, that lien must be first discharged. (*r*) Neither

Application to rectify refused.

(*e*) Smith's case, 2 Ch. 604, and 4 H. L. 64; Pawle's case, 4 Ch. 497; McNeill's case, 10 Eq. 503; Fox's case, 5 Eq. 118.

(*f*) See Parker's case, 2 Ch. 685, and *infra*, under the head transfer of shares.

(*g*) See Mann's case, 3 Ch. 459 *n*; Capper's case, ib. 458.

(*h*) See Hart's case, 6 Eq. 512; Wilson's case, 8 Eq. 240.

(*i*) See Symon's case, 5 Ch. 298.

(*k*) Parson's case, 8 Eq. 656.

(*l*) See Kintrea's case, 5 Ch. 95.

(*m*) See, as to this, Bahia and San Francisco Rail. Co. L. R. 3 Q. B. 584, and other cases of that sort noticed *ante*, p. 135. Compare Askew's case, 9 Ch. 664 where an action was directed.

(*n*) *Ex parte* Shaw, 18 Eq. 16; *Ex parte* Thomas, ib. 18 note. It seems that in these cases the company may rectify its own mistake. Hartley's case, 18 Eq. 542, and 10 Ch. 157; Re Etna Ins. Co. Ir. R. 7 Eq. 264.

(*o*) *Ex parte* Shaw, 2 Q. B. D. 463.

(*p*) *Ex parte* Ward, L. R. 3 Ex. 180.

(*q*) East Wheal Martha Mining Co. 33 Beav. 119.

(*r*) See London, Birmingham, &c.

can a person who was entitled to be on the register have it rectified in his favor if he has allowed some one else to be registered in his place, and such person has transferred his share to a *bonâ fide* purchaser (*s*); and as will be seen hereafter, under the head "Contributories," delay in applying to the Court is often fatal to the application. Nor can a company which has, when prosperous, persistently refused to register a person, obtain an order to register him when the company is in difficulties. (*t*)

If a person has suffered damage by reason of a company improperly excluding him from or retaining him on its register, the company will be ordered to pay it. (*u*) Damages.

So long as the company is a going concern, the Court has apparently no jurisdiction under the 35th section, to order costs to be paid by any one except by the company. (*x*) Costs.

If the application is made after the liquidation has commenced, the Court has jurisdiction to order them to be paid as it may think fit. (*y*)

The jurisdiction conferred by this section on the Vice-Warden of the Stannaries to rectify the register of companies *within the district of the Stannaries, *175 does not exclude the jurisdiction of the High Court for the same purpose. (*z*) Stannaries.

Notice of an order rectifying the register must in most cases be given to the registrar. (*a*)

By § 98 of the act of 1862 it is provided that when a company is being wound up, the Court winding it up shall have power to rectify the register of members; and this power is constantly acted upon. (*b*) In determining who are contributories, the actual state of the register is therefore of much less importance than the state in which it ought to be. Correction of register on winding up of company.

Bank, 34 Beav. 332; Stockton Malleable Iron Co. 2 Ch. D. 101.

(*s*) London and Provincial Telegraph Co. 9 Eq. 653.

(*t*) See Sichell's case, 3 Ch. 119.

(*u*) *Re* New Quebrada Co. 2 W. N. 200.

(*x*) *Ex parte* Sargent, 17 Eq. 273; *Ex parte* Kintrea, 5 Ch. 95.

(*y*) See the last case. In Wood's case, 15 Eq. 273, the company was ordered to pay costs as between solicitor and client.

(*z*) The Penhale and Lomax, &c. Co. 2 Ch. 398.

(*a*) § 36.

(*b*) No special application to rectify the register is necessary in these cases; Breckenridge's case, 2 Hem. & M. 642. The power conferred by § 98 is not more extensive than that conferred by § 35. See Sichell's case, 3 Ch. 119;

A company can correct its own register where a Court would compel it to do so. (*c*)

Inspection of register.

Every person, whether a member or not, has a right to inspect the company's register, and to have a copy of it, or of any part of it, on payment of a small fee (§ 32). Every member is entitled to inspect the register gratis; other persons may be required to pay one shilling (§ 32). The register may be temporarily closed (§ 33).

Observations on register.

The act does not expressly require the register to be sealed with the company's seal; and a book kept as required by § 25 may, it is conceived, be evidence under § 37, though not sealed. (*d*)

Annual list and summary.

In addition to the register of members above referred to, every company having a capital divided into shares is bound to keep in a separate part of its register of members, and once a year at least to make out and transmit to the registrar of joint-stock companies, a list of its members and late members, and a summary showing the amount of the company's capital, and the number of shares into which it is divided, and the number of shares issued and forfeited, and the amount of calls made, received, and unpaid (§§ 26 and 27, and sched. 2, form E.). And *176 every company not having a capital divided into *shares is bound to keep at its registered office a register of its directors and managers, and to send a copy of such register to the registrar of joint-stock companies, and to notify all changes amongst them to him (§§ 45 and 46). When share warrants transferable to bearer have been issued under the Companies act, 1867, the annual return must be varied as required by that act. (*e*)

Inspection.

These documents when registered are open to the inspection of every one on payment of a small fee (§ 174, cl. 5; see also as to their inspection, § 32).

2. *Companies registered under the Companies Act*, 1862, *but not formed under it.*

Little need be said with respect to the formation of companies

(*c*) Reese River Co. *v.* Smith, L. R. 4 H. L. 64. Hartley's case, 18 Eq. 542, and 10 Ch. 157. See *ante*, pp. 144, 173.

(*d*) See Cornwall, &c. Mining Co. *v.* Bennet, 4 H. & N. 423, and see *ante*, pp. 139–140.

(*e*) See 30 & 31 Vict. c. 131, § 32.

which may be registered under the act of 1862, but which are not formed under its provisions. Such companies, if created already, must have been formed either under acts now repealed, or in one of the various methods which have been considered in preceding pages; and companies, if created hereafter, but not under the act, must, as the law at present stands, be formed in one or other of the same methods, that is to say, under some special act of Parliament, or under a royal charter or letters patent, or, if for working mines in Cornwall or Devonshire, on what is called the cost-book principle.

It has been already seen that registration, under the act of companies not formed under it, is in some cases compulsory, in some impossible, and in others optional. (*f*) With respect to existing companies which are required to register, and which omit so to do, the consequences of non-registration are serious; for, first, such companies cannot sue (*g*); secondly, no dividends can be lawfully paid to their shareholders; and, thirdly, each of their directors becomes liable to a penalty of 5*l.* per day (§ 210). (*h*)

*Companies not formed under the act but capable of being registered under it, may, subject to certain restrictions and qualifications (see §§ 179–188), be registered either with or without limited liability (§ 180); and such liability, if limited, may be limited either by guarantee or by shares (§ 180). *177

Registration of existing companies with limited liability.

Every company when registered becomes incorporated under the act (§§ 191 and 192.) The incorporation, however, does not deprive the company of its property or acquired rights (§ 193), nor discharge it from its debts or other liabilities (§ 194). (*i*) But after registration no execution upon a judgment against the company can be issued against its members (§ 195). The creditors, therefore, of an existing company, must, after its registration, proceed to wind up the company, if they can-

Effect of registration.

(*f*) *Ante*, pp. 165, *et seq.*

(*g*) Accordingly it was held in the case of the Waterloo Insur. Co. 31 Beav. 586, that an insurance company could not petition to be wound up before it was registered.

(*h*) A company required to register under the act by § 209, and registered accordingly, is in the same position as if it had been registered voluntarily, Ramsay's case, 3 Ch. D. 388.

(*i*) See Groux's Soap Co. *v.* Cooper, 8 C. B. N. S. 800, where a surety to a company registered under 7 & 8 Vict. c. 110, and registered with limited liability under 18 & 19 Vict. 133, was held not to be discharged by such registration.

not obtain payment of their debts by execution against the property of the company. (*k*)

Upon compliance with certain requisitions mentioned in the act, and which need not be here specified (see §§ 109, 179, and 183–8), the registrar is required to certify that the company is incorporated under the act, and in the case of a limited company, that it is limited (§ 191); and his certificate is conclusive evidence that all requisitions have been complied with, and that the company is authorized to be registered as a limited or unlimited company, as the case may be (§ 192). (*l*)

Change of name.

An existing company cannot, apparently, change its name on registration, except by adding the word "limited" to its former name. (Compare § 183, cl. 3., and *178 § 190.) After *registration, however, it has the power of changing its name as if it were formed under the act. (See §§ 12, 13, 20, and 196). (*m*)

Membership in these companies.

The question who is a member in a company registered, but not formed under the act of 1862, depends upon the constitution of the particular company, and must be determined upon the principles which have been already considered (see § 196). With respect, however, to companies governed by the repealed acts of 7 & 8 Vict. c. 110, 7 & 8 Vict. c. 113, and 19 & 20 Vict. c. 47, it may be useful to add a few observations.

7 & 8 Vict. c. 110.

Companies formed under 7 & 8 Vict. c. 110, were incorporated by registration, but before being so incorporated they passed through a preliminary state, viz., that of provisional registration, the object of which was to enable the public to ascertain the nature and objects of the proposed company and the persons who projected it. Provisional registration did not incorporate the company or its promotors (*n*), nor did it affect their liability for each other's acts (*o*). A certificate of complete regis-

(*k*) The effect of registration on the liabilities of members will be considered hereafter. It has been held that § 194 does not affect the question who ought to be contributories on the winding up of the company, Fountain's case, 11 Jur. N. S. 553; and that § 195 does not prevent a shareholder in a cost-book mining company, who had retired before the registration, from being sued in respect of a debt contracted whilst he was a shareholder; Lanyon *v.* Smith, 3 B. & Sm. 938; Harvey *v.* Clough, 2 N. R. 204. As to what companies cannot register, see *ante*, p. 166.

(*l*) See, as to this certificate, *ante*, pp. 163–164.

(*m*) See as to changing name, *ante*, p. 164.

(*n*) See R. *v.* Whitmarsh, 14 Q. B. 802.

(*o*) See Reynell *v.* Lewis, and Wyld *v.*

tration was necessary to form and incorporate the company; and before this could be obtained a deed of settlement containing certain covenants and particulars specified by the act was required to be executed by at least one-fourth of the subscribers to the company. The certificate of complete registration was conclusive evidence that all the requisitions of the act had been duly complied with. (*p*) The act defined a shareholder to mean any person entitled to a share, *and* who had executed the deed of settlement or a deed referring to it; and it was held that no person was a shareholder who had not executed such deed. (*q*)

Chartered banking companies were formed under the repealed act of 7 & 8 Vict. c. 113, by letters patent and a deed of settlement set forth in it. This act contained no definition of the word shareholder, but persons whose names were returned as *shareholders to the stamp office pursuant to the act were *primâ facie* liable as share holders. (*r*) *179

Chartered banking companies. 7 & 8 Vict. c. 113.

Companies were formed under the acts of 1856–8, as under the act of 1862, by registration. Under 19 & 20 Vict. c. 47, § 19, every person who had accepted shares in a company formed under it, and whose name was entered in the company's register, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him) was a shareholder; and § 20 in effect declared that a transferor of a share should be deemed a shareholder until the transferee was registered in his place. These enactments may still be important. Moreover, notwithstanding the repeal of the act of 1856, the regulations contained in table B. in the schedule to that act still apply to those companies which were subject to them when the Companies act, 1862, was passed (see § 206). These regulations, therefore, must be consulted in order to decide who is or who is not a member of such companies; and as regards other companies registered under the act of 1856, attention must be paid to their regulations, deeds of settlement, charters, &c. (*s*)

Joint-stock companies act, 1856.

Hopkins, 15 M. & W. 517; Walstab *v.* Spottiswoode, ib. 501.

(*p*) Banwen Iron Co. *v.* Barnett, 8 C. B. 406; Bird's case, 1 Sim. N. S. 47; Pilbrow *v.* Pilbrow's Atmospheric Co. 5 C. B. 440.

(*q*) See *ante*, p. 124, *et seq.*

(*r*) Dossett *v.* Harding, 1 C. B. N. S. 524; Powis *v.* Harding, ib. 551; Thompson *v.* Harding, ib. 555; Fry *v.* Russell, 3 ib. 665; Powis *v.* Butler, ib. 645, and 4 ib. 469; Daniell *v.* Royal Brit. Bank, 1 H. & N. 681; Henderson *v.* Royal Brit. Bank, 7 E. & B. 356.

(*s*) See New Brunswick Rail Co. *v.* Muggeridge, 1 H. & N. 160 and 580.

*180

*CHAPTER VI.

OF ILLEGAL PARTNERSHIPS AND COMPANIES.

Illegal partnerships and corporations.

In order that a partnership may result from a contract, such contract must be free from the taint of illegality. This gives rise to two questions which it is proposed to discuss in this chapter, viz. 1. What partnerships are illegal; and, 2. What are the consequences of their being so.

SECTION I.—WHAT PARTNERSHIPS ARE ILLEGAL.

Illegality is never presumed, but must always be proved by those who assert its existence; and in order to show that a partnership is illegal it is necessary to establish either that the object of the partnership is one the attainment of which is contrary to law, or that the object being legal, its attainment is sought in a manner which the law forbids. But proof that a firm has been guilty of an illegal act is not sufficient to bring the firm within the class of illegal partnerships; for if this were enough, every partnership which does not pay its debts, or which commits any tort, or is guilty of culpable negligence, would be illegal, which is obviously absurd. (*a*) Neither does it by any means follow that because one or more clauses in a contract of partnership are illegal, the partnership is itself illegal. (*b*) [1]

and Bog Lead Mining Co. *v.* Montague, 8 Jur. N. S. 310, noticed *ante*, p. 126.

(*a*) See Armstrong *v.* Armstrong, 3 M. & K. 64 and 65; Sharp *v.* Taylor, 2 Ph. 818; Brett *v.* Beckwith, 3 Jur. N. S. 31, M. R.; Longworth's Ex. case, 1 De G. F. & J. 17. See the Judgment of Lord Campbell.

(*b*) See R. *v.* Stainer, L. R. 1 Cr. Ca. Res. 230; General Co. of Land Credit, 5 Ch. 363.

[1] See Lane *v.* Thomas, 37 Tex. 157; Pfeiffer *v.* Maltby, 38 id. 523.

*1. A partnership may be illegal upon the general ground, that it is formed for a purpose forbidden by the current notions of morality, religion, or public policy.[1] A partnership, for example formed for the purpose of deriving profit from the sale of obscene prints, or of books reviling or ridiculing the established religion, or for the procurement of marriages, or of public offices of trust, would be undoubtedly illegal. (*c*) In the time of Charles II, it seems to have been held that a contract for sharing the profits derived from the public exhibition of a human monster was illegal (*d*); but the writer is not aware of any modern case to the same effect, and the decision alluded to would not probably now be followed upon the grounds of public policy.

*181 Grounds of illegality.

Public Policy.

Whilst two countries are at war it is, by the law of each country, illegal for persons resident in either to have dealings with persons resident in the other. A partnership, therefore, formed between persons domiciled in this country for the purpose of trading with an enemy's country is illegal; and *à fortiori* is such a partnership illegal if one of the members of it is domiciled in that country, and is therefore an alien enemy. (*e*)[2]

War.

[1] See Bartle *v.* Coleman, 4 Pet. 184.

Partners may modify, alter or dissolve the co-partnership contract as between themselves, either in whole or in part, provided they do not violate any principle of law or public policy. Solomon *v.* Solomon, 2 Ga. 18.

Partners in a lease of the penitentiary can make no contract for the use or hire of the negro convicts, except in the employments required by law. Any contract, express or implied, for any other use is against public policy and cannot be enforced; and all items for such services in the liquidation of the partnership must be struck from the account between the partners. Pratt *v.* McHatton, 11 La. Ann. 260.

An agreement may, as to the parties, be usurious, and yet make them liable as partners to third persons. Pierson *v.* Steinmyer, 4 Rich. 309.

(*c*) See the title Illegal Contracts, in Chitty's and Addison's treatises on the Law of Contracts: and as to the sale of offices, Sterry *v.* Clifton, 9 C. B. 110; and as to associations for promulgating irreligious opinions, see Pare *v.* Clegg, 29 Beav. 589; Thornton *v.* Howe, 8 Jur. N. S. 663.

(*d*) See Herring *v.* Walround, 2 Ch. Ca. 110. The thing exhibited was a pair of female children, having "two heads, four arms, four legs, and but one belly where their two bodies were conjoined."

(*e*) See Evans *v.* Richardson, 3 Mer. 469.

[2] Where in an action by two parties against the defendant, claiming an interest in the profits of a contract for the purchase of cotton, upon unprohibited territory, during the continuance of the proclamation of August 16, 1861, one party died during the trial, and the suit was continued under order of the court by the other party, a loyal citizen, as survivor: *Held*, that the rights

But a partnership in this country for running a blockade established by one belligerent nation in the ports of another is not illegal; for subject to the risk of capture a neutral may lawfully trade with a belligerent. (*f*)

Trading under an assumed name.

It has at times been made a question how far it is in accordance with public policy to allow a person to carry on business under a name not his own. This certainly appears very like a fraud upon the public; but it is done every day; and when a firm has an established reputation and one of its members dies, it is not deemed wrong for the survivors to continue the business under the old name, although, perhaps *182 the *reputation of the firm may have been due mainly, if not entirely, to the ability and integrity of the deceased partner. The legal view of such conduct is in accordance with established usage, and it has been accordingly held not to be illegal for surviving partners to continue to carry on business under the old name. (*g*)

Although it is unlawful to assume a name which is already in use as a trade mark, it is clear that a partnership is not illegal simply because it carries on business under a name to which somebody else is entitled to object. It is equally clear that, unless by some special statute, (*h*) a partnership is not illegal simply because it carries on business under a name which does not disclose its members, *e. g.*, under such a name as "The Investment and Advance Company." (*i*) It is indeed said that it is illegal at common law for persons not incorporated to assume to act as if they were, and that to trade under such a name as the above is assuming so to act; but even if assuming to act as a corporation is an offense at common law, which is very doubtful, (*k*) the offense is not committed by trading under a name which is by usage as applicable to an unincorporated as to an incorporated body. (*l*)

of the latter were protected, notwithstanding the invalidity of the contract in respect to the deceased partner on account of his disloyalty, and that he could recover his share of the profits. Leftwich *v.* Clinton, 4 Lans. 176. See *post*, p. 232, note.

(*f*) *Ex parte* Chavasse, 4 De G. J. & Sm. 655.

(*g*) See Bunn *v.* Guy, 4 East, 190; Aubin *v.* Holt, 2 K. & J. 66; Lewis v. Langdon, 7 Sim. 421; and compare Thornbury *v.* Bevill, 1 Y. & C. C. 554.

(*h*) See as to pawnbrokers, *infra*.

(*i*) See Maughan *v.* Sharpe, 17 C. B. N. S. 443, Gerrard *v.* Hardey, 5 Man. & Gr. 471; *Ex parte* Grisewood, 4 De G. & J. 544.

(*k*) See *infra*, the citation from 6 Man. & Gr. 107.

(*l*) See the cases in the last note but one. An unincorporated society was held to have no right to be provisionally registered under 7 & 8 Vict. c. 110,

2. A partnership is illegal if formed for the purpose of deriving profit from a criminal offense, *e. g.*, from smuggling, robbery, theft, &c. (*m*) A curious instance of a partnership between two highwaymen is said to have come before the Courts in the early part of the last century, and to have been referred to by Lord Kenyon. As the case is not to be found *in the reports, an abridged note of it is given below; (*n*) *183 but there is some doubt whether it actually occurred. Real or fictitious, it is a good illustration of an illegal partnership of the class in question. Profits of crime.

3. A partnership is also illegal if formed for a purpose forbidden by statute, although independently of the statute, there would be no illegality.[1] At one time a distinction was Partnerships illegal by special statutes.

under a name which necessarily denoted a corporation, *e. g.* the Sea, Fire, etc. Insurance Corporation, R. *v.* Whitmarsh, 14 Q. B. 803.

(*m*) See Biggs *v.* Lawrence, 3 T. R. 454; and Stewart *v.* Gibson, 7 Cl. & Fin. 707, as to smuggling. The last case is instructive on account of the care taken to conceal the true nature of the illegal transaction.

(*n*) Everet *v.* Williams (2 Pothier on Obligations, by Evans, p. 3, note citing Europ. Mag. 1787, vol. 2, p. 360), is said to have been a suit instituted by one highwayman against another for an account of their plunder. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, etc.; that the defendant applied to him to become a partner; and that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, taverns, alehouses, markets, and fairs; that the plaintiff and the defendant proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the defendant told the plaintiff that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the defendant informed the plaintiff that there was a gentleman at Blackheath, who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money; that they accordingly went and met with the said gentleman, and after some small discourse, they

[1] Where the city ordinance provided that every proposal for work for the city should contain the names of all persons who are interested, and prohibited any secret agreement or understanding that any one not named should become interested in any contract: *Held*, that a secret partnership made by two persons, that they were to be equally interested in the contract for work obtained by one of the two partners, was illegal, being against public policy and contrary to positive law. Kelly *v.* Devlin 58, How. Pr. 487.

taken between *mala prohibita* and *mala in se;* but this distinction has very properly long ceased to be recognized as of any value for legal purposes. What judicial tribunals have to regard is the law they are called on to administer; and what is forbidden by that law, is illegal, whether it is also forbidden by the laws of morality and religion or not. (*o*)

*184 *Whether a partnership is illegal by virtue of any particular statute, obviously depends upon the construction of the statute in question. With reference, however, to those statutes which prohibit unqualified persons from carrying on certain trades or businesses, it may be observed, that such statutes are not infringed by an unqualified person who does nothing more than share the profits arising from those trades or businesses, if they are in fact carried on by persons who are duly qualified. By sharing the profits of the business the unqualified person may be deemed to carry it on for some purposes, *e. g.*, for the purpose of being made a bankrupt as a trader; but he is not within the mischief of the statutes in question, and the partnership of which he is a member is not therefore illegal. (*p*)

Observations on such acts.

Again, although a statute may in terms apparently prohibit an act or omission, and affix a penalty in case of disobedience, it does not necessarily follow that all transactions to which the penalty attaches are illegal. They are so if the statute is really prohibitory; (*q*) but they are not so if the true construction of the statute is that the penalty is, as it were, the price of a license for doing what the statute apparently forbids. (*r*) Therefore, it was held in Brown v. Duncan, (*s*) that a firm of distillers was not illegal,

dealt for the said horse, etc.; that the plaintiff and the defendant continued their joint dealings together until Michaelmas, and dealt together at several places, viz., at Bagshot, Salisbury, Hampstead and elsewhere, to the amount of 2000*l.*, and upwards. The rest of the bill was in the ordinary form for a partnership account. The bill is said to have been dismissed with costs, to be paid by the counsel who signed it; and the solicitors for the plaintiff were attached and fined 50*l.* a piece. The plaintiff and the defendant were, it is said, both hanged, and one of the solicitors for the plaintiff was afterwards transported. See 20 Eq. 230, note.

(*o*) See Aubert *v.* Maze, 2 Bos. & P. 371.

(*p*) See Raynard *v.* Chase, 1 Burr. 2, and *infra*, under the head of Solicitors.

(*q*) Bartlett *v.* Vinor, Carth. 252; Taylor *v.* The Crowland Gas and Coke Co. 10 Ex. 293.

(*r*) Smith *v.* Mawhood, 14 M. & W. 452; Swan *v.* The Bank of Scotland, 2 Mon. & Ayr. 661; Johnson *v.* Hudson, 11 East, 180.

(*s*) 10 B. & C. 93, and see Smith *v.* Mawhood, 14 M. & W. 452.

although one of the firm carried on business as a retail dealer in spirits, within two miles of the distillery (contrary to 4 Geo. 4, c. 94, §§ 132, 133), and was not registered as one of the firm in the excise books (as required by 6 Geo. 4, c. 81, § 7). It may, however, be doubted whether the statutes in question were properly construed by the court. (*t*)

The most important instances of partnerships rendered illegal by statute are as follows:—

Attorneys and Solicitors.[1]—See *infra*, Solicitors, p. 190.

Bankers.—By 7 and 8 Vict. c. 32, § 1 (*u*), all bankers are *required on the first day of January, in every year, to make a return to the stamp office of their names, residences, and occupations, or in the case of a company or partnership, of the name, residence, and occupation of every member of the company or partnership, and in default a penalty of 50*l.* is inflicted. Upon this act a question might arise as to the legality of a banking partnership, or company, composed in part of members whose names are not returned. *185 Bankers.

By two statutes, which have since been considerably modified, it was made unlawful for banking firms of more than six members, to issue in London or within sixty-five miles thereof, notes payable on demand, or within six months after date. (*x*) Issue of notes.

(*t*) See Pawnbrokers, *infra*.

[1] There is nothing in the nature or essence of a partnership which requires that it should be confined to ordinary trade and commerce or to dealings in personal property. It may exist between attorneys, conveyancers, mechanics, owners of a line of stage coaches, artisans, or farmers, as well as between merchants and bankers, and it may exist between dealers and speculators in real estate, without becoming void by operation of the statute of frauds. Chester *v.* Dickenson, 45 How. Pr. 325. See *post*, p. 190, note.

(*u*) §§ 8 and 29 of this act and parts of §§ 9 and 23, are repealed by 37 and 38 Vict. c. 96.

(*x*) 39 & 40 Geo. 3, c. 28, § 15; 7 Geo. 4, c. 46. See Broughton *v.* Manchester and Salford Waterworks Co. 3 B. & A. 1; Bank of England *v.* Anderson, 3 Bing. N. C. 589; Bank of England *v.* Booth, 2 Keen. 466; and on appeal, Booth *v.* Bank of England, 6 Bing. N. C. 415; and 7 Cl. & Fin. 509. By a subsequent act (9 Geo. 4, c. 23) the right to issue bills and notes payable on demand was extended to all bankers (except within London or three miles thereof), provided they obtained a license and gave security, as required by the act. By 3 & 4 Will. 4, c. 83, § 2, it was made lawful for banking firms of more than six persons to issue notes payable in London through an agent, or to draw bills or notes upon any agent in London, payable on demand, or otherwise, in London, and for any less amount than 50*l.* Then the legislature retraced its steps, conferring by the act of 3 & 4 Will. 4, c. 98, certain privileges on

*186 *Upon these statutes, it was held, that a banking company of more than six persons associated for the purpose of issuing notes payable on demand, or within six months after date, was not illegal unless it was proved that the company issued such notes within sixty-five miles of London. (*y*) Upon a similar statute relating to Ireland (*z*), it was held, that in order to establish the illegality of a banking company upon the ground that its houses of business had been, from the time of the formation of the company until the commencement of the suit, and then were, at places in Ireland within fifty miles of Dublin, it was necessary to prove the existence of a place of business within that limit for the whole time alleged. (*a*) The statutes in ques-

the Bank of England, and enacting (§ 2) that during the continuance of those privileges no banking firm of more than six persons should issue in London, or within sixty-five miles thereof, bills or notes payable on demand, with a proviso, as to firms carrying on business beyond that limit, in favour of bills and notes, payable through an agent in London, and for not less than 5*l*. Then by the Bank Charter act of 1844 (7 & 8 Vict. c. 32, §§ 10 and 11), it is enacted that no person, other than a banker, who on the 6th of May, 1844, was lawfully issuing his own bank notes, shall issue any bank notes in any part of the United Kingdom; and that it shall not be lawful for any banker to issue in England and Wales bills or notes payable to bearer on demand; except that it shall be lawful for any banker who was, on the 6th of May, 1844, carrying on the business of a banker in England or Wales, and was then lawfully issuing in England or Wales his own bank notes under the authority of a license, to continue to issue such notes to the extent and under the conditions mentioned in the act; and by § 26, it is made lawful for banking firms, though of more than six members, carrying on business in London, or within sixty-five miles thereof, to draw, accept, or endorse bills not payable to bearer on demand. Such is the state of the law on this subject at the present time. The joint effect of the above enactments seems to be that: (1.) The Bank of England can alone issue, in London, or within three miles of it, notes payable to bearer on demand. (2.) Beyond that limit such notes may be issued by bankers who were lawfully issuing them before May, 1844, under a license; but by no other bankers; and not, therefore, by any banking firm of more than six persons carrying on the business of bankers within sixty-five miles of London. In other words, there are three limits: (1.) London and three miles around, in which the Bank of England has an exclusive monopoly. (2.) The district more than three, but within sixty-five miles of London, in which the monopoly is divided between the Bank of England and banking firms of less than six members, lawfully issuing notes before May, 1844. (3.) The district more than sixty-five miles from London, in which the monopoly is divided between the Bank of England and banking firms of six or more or less members, lawfully issuing notes before May, 1844.

(*y*) Ransford *v.* Copeland, 6 A. & E. 482.

(*z*) 6 Geo. 4, c. 42, § 10.

(*a*) Hughes *v.* Thorpe, 5 M. & W. 656.

tion, moreover, have been held only to affect partnerships formed for the purpose of carrying on the business of a banker, and not to interfere with the issue of notes by firms not carrying on such business.

By an act which, prior to 1857, regulated joint-stock banks in England (7 & 8 Vict. c. 113, § 1), it was not lawful for any company of more than six persons to carry on the trade or business of bankers in England under any agreement or covenant of co-partnership made or entered into on or after the 6th of May, 1844 (*b*), unless by virtue of letters patent to be *granted by *187 her Majesty according to the provisions of that act. Any banking company therefore formed since May, 1844, and not under letters patent, was altogether illegal if its members were more than six in number. (*c*) But the law on this head was altered by 20 & 21 Vict. c. 49, which repeals the act last referred to, and whilst requiring banking companies of seven or more persons to be registered, expressly declares that non-registration shall not render them illegal. (*d*)

Brokers.—By 6 Anne, c. 16, and 57 Geo. 3. c. 60 (loc. & pers.), a penalty was imposed upon brokers who acted as such in the city of London without being duly admitted so to do by the mayor and aldermen. (*e*) Dealers in shares in companies are brokers. (*f*) Although unqualified brokers could not recover their commission (*g*), yet they could recover from their principals money paid for them by their directions, or in conformity with the usages of the share market. (*h*) Brokers.

Liability to penalties under the statutes of Anne and Geo. 3, did not protect a broker from answering interrogatories relating to his dealings and transactions if he was sued in respect of them by his principal. (*i*) Discovery by unlicensed brokers.

(*b*) See Wigan *v.* Fowler, 1 Stark. 459; Perring *v.* Dunston, Ry. & M. 426.

(*c*) See O'Connor *v.* Bradshaw, 5 Ex. 882. Compare this case with R. *v.* Whitmarsh 15 Q. B. 600.

(*d*) 20 & 21 Vict. c. 49, §§ 4, 5.

(*e*) These acts are repealed by 33 & 34 Vict. c. 60, so far as regards the jurisdiction of the Corporation of London over brokers is concerned, but they must still be admitted, and they are liable to penalties if they practice without being admitted. The form of bond entered into by sworn brokers will be found in Nash *v.* Bryant, 25 Beav. 533, and in Green *v.* Weaver, 1 Sim. 412.

(*f*) Smith *v.* Lindo, 4 C. B. N. S. 395, and 5 ib. 587.

(*g*) Cope *v.* Rowlands, 2 M. & W. 149.

(*h*) Smith *v.* Lindo, *ubi supra;* Pidgeon *v.* Burslem, 3 Ex. 465; Jessopp *v.* Lutwyche, 10 Ex. 614.

(*i*) Green *v.* Weaver, 1 Sm. 404; Rob-

Insurers.—By a statute now repealed, it was made unlawful for any society or partnership (except the two corporations mentioned in the act) to carry on the business of maritime insurance or to lend money on bottomry. (*k*) This enactment gave rise to numerous decisions, which are frequently referred to as illustrating the consequences resulting from an illegal contract of partnership; and they will be noticed hereafter *when those consequences are examined. In the present place, however, it is not necessary to do more than collect them in a note for facility of reference. (*l*)

Marine insurers.

*188

The Marine policy stamp act, 30 Vict. c. 23, prevents marine insurances being effected otherwise than by written policies duly stamped. (*m*) Consequently, even if a mutual insurance company (the members of which insure each others' ships without any policies) can legally exist, the insured in such a case has no remedy against the insurers in case of a loss. (*n*)

Medical practitioners.—By the Medical act, 1858 (*o*), it is enacted (§ 32) that no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under the act. By the same act (§ 40), penalties are inflicted on all persons who willfully and falsely pretend to be, or take, or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description implying that he is registered under the act, or is recognized by law as a physician, &c.

Medical practitioners.

inson *v.* Kitchin, 8 De G. Mc. & G. 88, and 21 Beav. 365.

(*k*) 6 Geo. 1, c. 18, repealed by 5 Geo. 4, c. 114, § 1, as to insurances.

(*l*) The following are the decisions on the above enactment: Mitchell *v.* Cockburn, 2 H. Blacks. 279; Booth *v.* Hodgson, 6 T. R. 405; Lees *v.* Smith, 7 ib. 338; Harrison *v.* Millar, ib. 340, note; Everth *v.* Blackburne, 2 Stark. 66; *Ex parte* Bell, 1 M. & S. 751; Aubert *v.* Maze, 2 Bos. & P. 371; Watts *v.* Brooks, 3 Ves. 612; Knowles *v.* Haughton, 11 ib. 168.

(*m*) They can now be stamped after their execution on payment of a penalty, 39 Vict. c. 6, § 2; but a written policy is still necessary.

(*n*) See Edwards *v.* Aberayron Mutual Soc. 1 Q. B. D. 563; *Ex parte* Hargrove, 10 Ch. 542; Fisher *v.* Liverpool Marine Insur. Co. L. R. 9 Q. B. 418; Smith's case, 4 Ch. 611; Brett *v.* Beckwith, 3 Jur. N. S. 31; Bromley *v.* Williams, 32 Beav. 177. With these cases compare Martin's case, 14 Eq. 148.

(*o*) 21 & 22 Vict. c. 90.

Upon the above act, it has been decided that a medical practitioner may maintain an action for attendances, &c., although not registered when they took place, it being sufficient that he should be registered at the time of trial (*p*); and that there is nothing illegal in one member of a firm being registered in one *character and another in another; nor in their respectively *189 attending to their appropriate branches of the profession; nor in their jointly suing in respect of the services rendered by each in his own branch. (*q*) It has also been intimated by high authority that if only one member of a firm is duly registered, the requisitions of the statute are complied with. (*r*)

Patentees.—Prior to 1852 a patent for an invention contained a proviso to the effect that the patent should be void if more than twelve persons became interested in it as partners. (*s*) But by the 15 & 16 Vict. c. 83, § 36, it is enacted that "notwithstanding any proviso that may exist in former letters patent, it shall be lawful for a larger number than twelve persons hereafter to have a legal and beneficial interest in such letters patent." And in modern patents, the form of which is given in a schedule to the act just cited, there is no limit placed upon the number of persons who may be interested in a patented invention. Patentees.

Pawnbrokers.—By the statute 39 & 40 Geo. 3, c. 98, § 23, every person carrying on business of pawnbroking, is required to have his name legibly printed over the door of every shop or place where he carried on such business. Upon this enactment it has been held unlawful for several persons to carry on business as pawnbrokers in partnership, unless the names of all the partners are painted up as required by the act; and an agreement for a pawnbroking partnership is illegal if it is part of the agreement that the names of some of the partners shall be concealed, or in other words, if it is part of the agreement that some of the partners shall be dormant. (*t*) It is conceived, how- Pawnbrokers.

(*p*) Turner *v.* Reynell, 14 C. B. N. S. 328.

(*q*) Ibid.

(*r*) Per Erle, C. J. ib. See, further, De la Rosa *v.* Prieto, 16 C. B. N. S. 578; and as to pretending to be a legally qualified practitioner, see Pedgrift *v.* Chevalier, 8 C. B. N. S. 240 and 246; Ellis *v.* Kelly, 6 H. & N. 222. The cases decided upon the Apothecaries acts, 55 Geo. 3, c. 104, and 6 Geo. 4, c. 133, will be found in 1 Chitty's Statutes.

(*s*) Hindmarsh on Patents, 66. See, Duvergier *v.* Fellows, 5 Bing. 248, and on appeal, 10 B. & C. 826, and 1 Cl. & Fin. 39.

(*t*) See Lewis *v.* Armstrong, 3 M. & K. 53; Armstrong *v.* Lewis, 2 Cr. & M.

*190 ever, that pawnbroking may *be legally carried on by a registered company, and that if the name of the company is properly painted up, the act in question would be duly complied with.

Solicitors.

Solicitors.[1]—By several statutes it has long been unlawful for any person not duly qualified, to act by himself or another as a solicitor, or to suffer his name to be made use of upon the account, or for the profit of an unqualified person. (*u*) Upon these statutes questions have arisen as to how far it is lawful for a qualified solicitor to share the profits of his business with a person who is not qualified; and it has been held that there is no illegality in this where the non-qualified person does not share the profits in consideration of his acting in any manner as a solicitor. (*v*) For example, there is nothing illegal in an agreement that a sur-

274; Gordon *v.* Howden, 12 Cl. & Fin. 237; Frazer *v.* Hill, 1 M'Queen, 392. Compare Brown *v.* Duncan, 10 B. & C. 93, where one of a firm of distillers was not licensed as required by the excise laws.

[1] A partnership for the practice of the law is legal, and as in other partnerships, the act of one partner, in the professional business, is the act of all the partners. Every responsibility incident to other partnerships in general, attaches to legal partnerships as well as corresponding rights. Smith *v.* Hill, 13 Ark. 173. See, also, Livingston *v.* Cox, 6 Pa. St. 360.

Partnership may exist between a counselor-at-law and an attorney in their professional business, but the attorney must have the sole and entire superintendence of the attorney's business, for which he is responsible; and no person on the ground of such co-partnership can take any part in the conduct of a suit, whose office is at a different place from that of the attorney. Woodward's case, 4 John. 289.

In New Jersey, under a statute declaring that no man should prosecute his suit except by himself or by *a licensed attorney-at-law*, it was *held* that a party could not prosecute by two or more attorneys in partnership, since they could not bring themselves within the description and make *one licensed attorney-at-law*. Wilson *v.* Wilson, 5 N. J. Law, 791.

In New York, where a partnership exists between two attorneys, and a suit is prosecuted by one of them in the name of one of the partners only as the attorney of record, an action may be maintained in their joint names against their client for the recovery of the costs of the suit. Warner *v.* Griswold, 8 Wend. 665.

(*u*) See 6 & 7 Vict. c. 73, §§ 2, 26, 32. The prior acts were 22 Geo. 2, c. 46, § 11, which was repealed by 6 & 7 Vict. c. 73; and 25 Geo. 3, c. 80, §§ 7 and 37; ib. c. 80, § 30, repealed by 33 & 34 Vict. c. 99. See, as to partnerships between town clerks and other solicitors, Hughes *v.* Statham, 4 B. & C. 187; and as to prosecutions by partners of Clerks of the peace, see 5 & 6 Will. 4, c. 76, § 102, and R. *v.* Fox, 1 E. & E. 729.

(*v*) Scott *v.* Miller, Johns. 220, is a strong case on this head.

viving partner of a firm of solicitors shall share his profits with the widow of a late partner. (*x*)

But an agreement for a partnership in the ordinary sense of the word between a person duly qualified and one who is not, is clearly illegal (*y*); and if the agreement is in writing, and is for a present partnership, parol evidence cannot be admitted to show that it was not to take effect until both parties were qualified. (*z*) But an agreement between a solicitor and his articled clerk that the latter, when a solicitor, shall become a partner with the former and share his profits retrospectively, is not illegal. (*a*) However, the statutes cannot be evaded by an agreement to the effect that the unqualified person shall receive a share of the profits as a salary, and that he shall not be a partner with the other. (*b*) Nor can a solicitor's clerk (unless *himself qualified) act as a solicitor *191 under cover of his principal's name. (*c*) It was, however, held that a person who had been duly examined, sworn, and admitted, but who had not taken out his annual certificate, was not unqualified within the meaning of the act of Geo. 2 (*d*); and since the act 6 & 7 Vict. c. 46, it has been held not unlawful for a qualified solicitor to act upon the usual agency terms as the solicitor of another solicitor who has not taken out his certificate. (*e*)

It is illegal for two persons, one qualified and the other unqualified, to hold themselves out as partners, and to put both their names to bills of costs and other documents in which their names ought not to appear, unless they are qualified solicitors. (*f*)

Theatrical representations.—By several statutes now repealed (*g*) it was unlawful to act any play for gain except under certain restrictions. Partnerships therefore for Theater managers, &c.

(*x*) Candler *v.* Candler, Jac. 225, and 6 Madd. 141; Sterrey *v.* Clifton, 9 C. B. 110; and see Aubin *v.* Holt, 2 K. & J. 66.

(*y*) Williams *v.* Jones, 5 B. & C. 108. See Scott *v.* Miller, Johns. 220.

(*z*) Williams *v.* Jones, 5 B. & C. 108.

(*a*) *Ex parte* Joyce, 4 Ch. D. 596.

(*b*) Tench *v.* Roberts, 6 Madd. 145; *Re* Jackson, 1 B. & C. 270; see, too, *Re* Clark, 3 D. & R. 260; Hopkinson *v.* Smith, 1 Bing. 13. Quære the effect on these cases of the act 28 & 29 Vict. c. 86, *ante*, pp. 43, *et seq.*

(*c*) Hopkinson *v.* Smith, 1 Bing. 13; *Re* Palmer, 2 A. & E. 686.

(*d*) *Re* Hodgson, 3 A. & E. 224; and see *Re* Hodgkinson, 6 A. & E. 194.

(*e*) *Ex parte* Foley, 11 Beav. 456.

(*f*) Edmondson *v.* Davis, 4 Esp. 14.

(*g*) 10 Geo. 2, c. 28; 25 ib. c. 36 (made perpetual by 28 ib. c. 19); and 28 Geo. 3, c. 30; repealed by 6 and 7 Vict. c. 68. As to what is a theater within this act, see Davys *v.* Douglas, 4 H. & N. 180.

sharing profits to be derived from acting plays otherwise than in accordance with these acts were illegal. (*h*)

Unincorporated joint-stock companies with transferable shares.[1]

Unincorporated companies with transferable shares.

—It has been said that these are illegal at common law, first, because the privilege of having transferable shares can only be acquired by charter from the Crown, or by an act of Parliament; and, secondly, because all such companies are dangerous, mischievous, and, in short, public nuisances. But this view cannot, the writer thinks, be supported.

In order to investigate this subject properly, it is necessary to advert to the celebrated "Bubble act" of 1719, and the decisions upon it, for although that act is repealed, the discussions to which it gave rise are constantly referred to *192 when the illegality at common law of joint-stock *companies is alleged or denied. The Bubble act (*i*) was levelled more particularly at—

1. The acting or presuming to act as a corporate body.
2. The raising or pretending to raise transferable stock.
3. The using of charters for purposes not warranted by them.
4. The formation of dangerous and mischievous companies, tending to the grievance of the subjects of this realm.

1. With respect to acting or presuming to act as a body corporate, it was held in R. *v.* Webb, (*k*) that having a committee, general meetings, and power to make by-laws, was not unequivocally assuming to act as a body corporate; but in the later case of Josephs *v.* Pebrer (*l*) the Court was of a different opinion. To create transferable shares in a common stock has also been said to amount to assuming to act as a body corporate, although only

Assuming to act as a corporation.

(*h*) Ewing *v.* Osbaldiston, 2 M. & Cr. 53; De Begnis *v.* Armistead, 10 Bing. 107.

[1] An unincorporated body of men, associated for the purpose of banking, is but a partnership, the members having the same rights and subject to the same liabilities. Boisgerard *v.* Wall, 1 Smed. & M. Ch. 404.

A partnership may own and operate a street railway as well as a corporation. O'Neil *v.* Lamb, 6 N. W. Rep. 59.

(*i*) 6 Geo. 1, c. 18, s. 18. In the first two editions this act was printed at length, but it is omitted now for the sake of gaining space. The act was repealed by 6 Geo. 4, c. 91. The earliest reported decision on the Bubble act is R. *v.* Cawood, or Caywood, 2 Ld. Raymond, 1361, and 1 Str. 472, but that case throws no light on any question of present importance, as it merely relates to the punishment to be inflicted on a person found guilty of an infringement of the act. See as to the history of this act, Collyer on Partnership, p. 722, ed. 2.

(*k*) 14 East, 406.

(*l*) 3 B. & C. 639. Adopting a name which necessarily denotes a corporation is assuming to act as a corporation, R. *v.* Whitmarsh, 14 Q. B. 803, see *ante*, p. 182, note (*l*). So is the assumption and use of a common seal, Cooch *v.* Goodman, 2 Q. B. 580. These cases were not decided on the Bubble act, and do not show that an unincorporated society which assumes to act as a corporation is illegal.

such bodies corporate as are specially empowered so to do can lawfully possess stock, the shares in which are transferable. (*m*)

2. With respect to transferable stock it was held that any company not incorporated and specially empowered to possess such stock was illegal, if it professed to have its stock divisible into shares transferable from one person to another without restriction. (*n*) But it was held that, if the shares were not thus transferable, their transfer being restricted to such person as should be approved by a committee, and as should enter into some special agreement, (*o*) or to persons already members of the company, (*p*) the company was not necessarily illegal. A scheme for establishing a tontine, the shares in which were to be transferable after a certain time, was held not to be illegal, the scheme having failed before the time arrived. (*q*) And where a railway company, the shares in which were to be transferable, was projected, and the projectors issued scrip, but resolved that nothing further should be done without the authority of Parliament, it was held that the project was not illegal. (*r*)

Transferable shares.

*3. To use charters for purposes not authorized by them was clearly illegal, not only by the act, but at common law. This ground of illegality does not, however, appear to have been made the subject of any decision on the act now in question. *193

Using charters improperly.

4. Lastly, with respect to the general ground of illegality, for being mischievous, and tending to the grievance of the subjects of this realm. In R. *v.* Dodd (*s*) it was held that a company with transferable shares based upon a prospectus which declared that no person could be accountable beyond the amount of the shares for which he should subscribe, was illegal, on the ground that this was a mischievous delusion, calculated to ensnare an unwary public. In R. *v.* Webb (*t*), it was held that a company, the shares in which were transferable, but not without restriction, was not necessarily mischievous; and the jury having found that the company was in fact rather beneficial than otherwise, the company was held to be legal. As regards the important question, how far the mere raising transferable stock was *per se*, an offense against the act, the Court inclined to think that it was not, unless the company had in fact a mischievous tendency. (*u*) In Josephs *v.* Pebrer (*x*), a company with shares transferable without restriction, was held to be clearly mischievous, particularly because the shares were sold at a very considerable premium. Abbott, C. J., thought that this tended to introduce gaming and rash speculation to a ruinous extent, to the grievance of numbers of his Majesty's subjects.

Tendency to mischief.

Rex *v.* Dodd.

Rex *v.* Webb.

Josephs *v.* Pebrer.

(*m*) See Duvergier *v.* Fellows, 5 Bing. 248.

(*n*) Buck *v.* Buck, 1 Campb. 547; R. *v.* Stratton, ib. 549, note; Josephs *v.* Pebrer, 3 B. & C. 639.

(*o*) R. *v.* Webb, 14 East, 406; Pratt *v.* Hutchinson, 15 ib. 511.

(*p*) Per Lord Eldon, in Ellison *v.* Bignold, 2, J. & W. 510.

(*q*) Nockels *v.* Crosby, 3 B. & C. 814.

(*r*) Kempson *v.* Saunders, 4 Bing. 5.

(*s*) 9 East, 516, and see Blundell *v.* Winsor, 8 Sim. 601.

(*t*) 14 East, 406. This is the leading case on the Bubble act, and is well worthy of attentive perusal.

(*u*) See, too, Nockels *v.* Crosby, 3 B. & C. 814; Pratt *v.* Hutchinson, 15 East, 511; Brown *v.* Holt, 4 Taunt. 587.

(*x*) 3 B. & C. 639.

Such are the leading decisions on this celebrated act. Juster views of political economy, and of the limits within which legislative enactments should be confined, have led to the repeal of the statute in question, which, though deemed highly beneficial half a century ago, probably gave rise to much more mischief than it prevented. But the repeal of the act still leaves room for the contention that companies of the nature described in the act are illegal at common law. This question is one of present importance, especially in the colonies, and requires therefore careful consideration.

Opinion of Lord Eldon.

Lord Eldon, who certainly had a great aversion to companies, seems to have been of opinion, in Kinder *v.* Taylor (*y*), that companies with large capitals, arising from numerous small contributions, and with transferable shares, were injurious to the public, and were illegal, independently of the Bubble act. The same opinion was expressed by the Court of Common Pleas, in a case which arose after the repeal of that act (*z*), and also by the Vice-Chancellor Shadwell, on a still later occasion. (*a*) In none of these cases, however, was it necessary to decide this question. In Duvergier *v.* Fellows (*b*), the company was formed for an illegal purpose, *viz.*, the working of a patent which could not be lawfully transferred to more than five persons, and this was the ground relied on by the Court of Appeal. In Blundell *v.* Windsor (*c*) the Vice-Chancellor thought that there was held out to the public a false and fraudulent representation calculated to ensnare the unwary, *viz.*, a representation that any shareholder when he transferred his shares ceased to be liable to the debts of the company; and he relied on this as a ground of illegality. Although, therefore, in each of these cases the Court was of opinion that the company was illegal, inasmuch as it trenched upon the prerogative of the Crown by assuming to do that which cannot be lawfully done without special authority, there were additional circumstances, rendering it unnecessary to decide on this ground alone. In Walburn *v.* Ingilby (*d*) Lord Brougham declined to declare an unincorporated joint-stock company, with transferable shares, illegal; although the deed of settlement stated that provision was to be made, in all engagements to be entered into by the directors, that no shareholder should be liable beyond the amount of his share, and his lordship thought this clause was nugatory. In Garrard *v.* Hardey (*e*) it was held that an unincorporated joint-stock company, which had assumed the name of "The Limerick Marble and Stone Company," and had a capital of 50,000*l.*, divisible into 500 transferable shares, was not illegal at common law. It was in this case declared that the raising and transferring of stock in a company could not be held to be in itself an offense at common law. In Harrison *v.* Heathorn (*f*) a similar conclusion was arrived at. In this case the company's deed

Duvergier *v.* Fellows.

*194

Blundell *v.* Windsor.

Walburn *v.* Ingilby.

Garrard *v.* Hardey.

Harrison *v.* Heathorn.

(*y*) Coll. on Part. 917, ed. 2.

(*z*) Duvergier *v.* Fellows, 5 Bing. 248; affirmed 10 B. & C. 826, and 1 Cl. & Fin. 39.

(*a*) Blundell *v.* Winsor, 8 Sim. 601.

(*b*) 5 Bing. 248, and 10 B. & C. 826, and 1 Cl. & Fin. 39.

(*c*) 8 Sim. 601. This case cannot be supported. See Harrison *v.* Heathorn, 6 Man. & Gr. 81. In Blundell *v.* Winsor there was not in fact any such holding out as supposed by the Vice-Chancellor.

(*d*) 1 M. & K. 61, and Cooper, *temp.* Brougham, 270.

(*e*) 5 Man. & Gr. 471.

(*f*) 6 Man. & Gr. 81. See, too, Sheppard *v.* Oxenford, 1 K. & J. 491.

of settlement provided that a person ceasing to be a shareholder should be entitled to a certificate declaring him discharged from all liabilities on account of the shares formerly held by him. This was in fact, the same company as was held to be illegal by Vice-Chancellor Shadwell in Blundell *v.* Winsor, which, though not overruled on appeal, can scarcely be supported after the decision in Harrison *v.* Heathorn.

Attempts have also been made to induce the Courts to declare scrip companies (*i. e.*, unincorporated companies with shares transferable by delivery) to be illegal at common law. (*g*) But these attempts have been unsuccessful. The case of Blundell *v.* Winsor, always relied upon as an authority by those who contend that such a company is illegal, has never met with approbation from the bench; nor has it ever been followed.

Scrip companies.

Upon the whole, therefore, it appears that there is no case deciding that a joint-stock company with transferable shares, and not incorporated by charter or act of Parliament, is illegal at common law; that opinions have nevertheless differed upon this question; that the tendency of the Courts was formerly to declare such companies illegal; that this tendency exists *no longer; and that an unincorporated company with transferable shares will not be held illegal at common law, unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of her Majesty's subjects. The legality at common law of such companies may therefore be considered as finally established.

Conclusion from the cases.

*195

It is not easy to arrive at any other conclusion if the question is examined without reference to the decisions which have been noticed. For

Observations on the illegality of companies with transferable shares.

1. It is not illegal for persons, however numerous, to enter into an ordinary contract of partnership.

2. It is not illegal for all those persons to agree that one of them shall retire, and that a person who is not a member of the firm, but who is willing to become one, shall take his place.

3. It is not illegal for partners, however numerous, to agree once for all that any partner who is willing to retire shall be at liberty so to do, and to introduce in his place any person selected by himself.

4. It is not illegal for an out-going partner of a firm established on this last principle, to retire in favor of an in-coming partner, upon any terms to which they both agree, provided those terms are not themselves illegal.

5. It is not illegal for an out-going and in-coming partner to agree that the latter shall pay the former more or less than he himself paid when he entered the firm.

6. It is not illegal for the members of a partnership to assume a name (*h*), and to agree that the management of its affairs, both external and internal, shall be entrusted to a select few, and that those few shall have the power to make rules which the others will obey.

If these propositions are assented to, it will, it is conceived, be found impossible to establish the illegality at common law of unincorporated joint-stock companies with transferable shares. (*i*)

(*g*) See *Ex parte* Barclay, 26 Beav. 177; *Ex parte* Aston, 27 Beav. 474, and 4 De G. & J. 320; *Ex parte* Grisewood, 4 De G. & J. 544. As to the effect of the act of 1862 on these companies, see *infra*, p. 196.

(*h*) *Ante*, p. 194. See the qualification in p. 192, note (*l*).

(*i*) See Walburn *v.* Ingilby, Cooper, *temp.* Brougham, 270.

To say that such a partnership is illegal, because it assumes to act as a corporation, is untrue; for none of the above acts are characteristic of corporations. What distinguishes corporations from other bodies is their independent personality; and no society which does not arrogate to itself this character can be fairly said to assume to act as a corporation. Besides this, it is by no means clear that it is illegal at common law to assume to act as a body corporate. (*k*)

To assert that unincorporated companies with transferable shares are mischievous and dangerous, and therefore illegal, is to assert a proposition the truth of which has not yet been established, and which therefore cannot be admitted as the basis of a judicial inference. This ground of illegality would probably not have been relied upon so much had it not been for the technical rules of pleading which required all the members of a firm, however numerous, to be made defendants to actions and suits against the firm. This rule undoubtedly created difficulties in
*196 *dealing with large bodies of persons unless they were incorporated; but if the question is reduced to this, viz., whether the rule, or a company to which it is inapplicable, most deserves to be characterized as mischievous, the question must surely be answered in favor of the company and against the rule. The rule, however, being established at law, the judges felt bound to adhere to it, and then finding it difficult to deal with unincorporated companies, declared them mischievous and illegal. As will be seen hereafter, the difficulty presented by the rule in question has been to a great extent removed.

Effect of non-registration.

Assuming an unincorporated joint-stock company not to be illegal at common law, it remains to be considered whether it is rendered illegal, by statute, if not registered.

Companies act, 1862.

The Companies act, 1862, is extremely important in this respect, for the 4th section says imperatively that no company, association, or partnership, shall be formed after the 2nd of November, 1862, except as therein mentioned. From this it follows that companies, associations, and partnerships required to register under that section, are illegal if not registered. (*l*) In this respect the act of 1862 differs from the Companies acts of 1856 and 1857 (*m*), and resembles the older acts of 7 & 8 Vict. c. 110, and c. 113. (*n*)

(*k*) See 6 Man. & Gr. 107, where Tindal, C. J., says, "I am not aware that presuming to act as a body corporate was an offense at common law." As to assuming a corporate name and using a corporate seal, see *ante*, p. 192, note (*l*).

(*l*) See acc. S. Wales Atlantic Steamship Co. 2 Ch. D. 763; *Ex parte* Hargrove, 10 Ch. 542; Harris *v.* Amery, L. R. 1 C. P. 148.

(*m*) See 20 & 21 Vict. c. 14, § 3, and c. 49, § 5.

(*n*) As to which see O'Connor *v.* Bradshaw, 5 Ex. 882, as to banks; and as to other companies, Butt *v.* Monteaux, 1 K. & J. 98; Sheppard *v.* Oxenford, ib. 491. The 7 & 8 Vict. c. 110, did not apply to companies formed before the passing of the act, *Ex parte* Aston, 27 Beav. 474, and 4 De G. & J. 320; and see Womersley *v.* Merritt, 4 Eq. 695.

The question whether scrip companies formed since the Act of 1862 are illegal, has not yet been determined; it is of great practical importance, and before deciding it another case should not only to the precise language of the Act, but also to the difference between agreements to form companies and partnerships companies and partnerships which are actually formed. Such and required by the Companies Act 1862 to register under it are not illegal, although the consequences of so doing may be severe (see § 210).

*Companies formed before the 31st of November, 1862, may

SECTION II.—CONSEQUENCES OF ILLEGALITY.

If a partnership, when it is formed, will be illegal, any contract to form it must be illegal also. Upon this ground it was held in Duvergier v. Fellows (*r*), that a bond for the payment of money upon the formation by the defendant of an illegal company was invalid; and in Williams v. Jones (*s*), that no action lay for the recovery of a premium agreed to be paid by the defendant, on being taken into partnership with the plaintiff, and which partnership was illegal.

It does not, however, follow that because an agreement to form a given partnership or company is illegal, those who subscribe to its formation cannot recover back their subscriptions. If money is paid by A. to B. to be applied by him for some illegal purpose, it is competent for A. to require B. to hand back the money if he, B., has not already parted with it. (*t*) Although, therefore, the subscribers to an illegal company have not a right to an account of the dealings and transactions of that company and of the profits made thereby, they have a right

(*o*) The point was discussed in The Gen. Co. for the promotion of Land Credit, 5 Ch. 363, and Princess of Reuss v. Bos. L. R. 5 H. L. 176. It is tolerably plain that shares not paid up in full cannot be made transferable to bearer.

(*p*) See *ante*, pp. 31 *et seq.*

(*q*) *Ante*, p. 194.

(*r*) 5 Bing. 248; 10 B. & C. 826; and 1 Cl. & Fin. 39.

(*s*) 5 B. & C. 108.

(*t*) See Taylor v. Lendy, 9 East. 49; Varney v. Hickman, 5 C. B. 271; Diggle v. Higgs, L. R. 2 Ex. D. 422; Hampden v. Walsh, 1 Q. B. D. 189; Taylor v. Bowers, ib. 291.

to have their subscriptions returned (*u*); and even though the moneys subscribed have been laid out in the purchase of land and other things for the purpose of the company, the subscribers are entitled to have that land and those things reconverted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases, no illegal conduct is sought to be *198 enforced; on the *contrary, the continuance of what is illegal is sought to be prevented.

Actions for account.

Sheppard *v.* Oxenford.

In Sheppard *v.* Oxenford (*x*), a company was started for working mines in Brazil. The members subscribed each a certain sum and received a sort of scrip certificate specifying the number of shares to which each was entitled. Mines, buildings, plant, and shares were bought, and at a meeting of the subscribers the defendant and another were appointed sole directors and trustees of the property of the association. Disputes having arisen, a bill was filed against the defendant (his co-trustee being dead) by one of the shareholders on behalf of himself and the others for an account of the moneys received and paid by the directors, and of the debts of the association, and for payment of those debts out of the assets, and for a division of the profits among the shareholders, and for an injunction to prevent the defendant from selling the property, and for a receiver. It was contended that the company was illegal, and that no relief could be given; but it was held that the defendant as trustee could not dispute the trust on which he had accepted the property; and a demurrer to the bill was overruled and a receiver and manager was appointed.[1]

(*u*) See Harvey *v.* Collett, 15 Sim. 332. Compare the cases in the next note.

(*x*) Sheppard *v.* Oxenford. 1 K. &. J. 491. See, too, Butt *v.* Monteaux, ib. 98. If in these cases the companies were really illegal, they must be regarded as modifying the general proposition, that a court of equity will not assist a person to get back property which he has transferred to another for some illegal purpose. See Brackenbury *v.* Brackenbury, 2 J. &. W. 391; Groves *v.* Groves, 3 Y. & J. 163.

[1] After a partnership contract confessedly against public policy, has been carried out, and money contributed by one of the partners has passed into other forms, a partner, in whose hands the profits are, cannot refuse to account for and divide them, on the ground of the illegal character of the original contract. Brooks *v.* Martin, 2 Wall. 70.

Parties in Brownsville, in 1864, made a partnership for purpose of shipping merchandise from Matamoras, in Mexico, to Texas, with a view to obtaining cotton. In 1866, the parties on settlement adjusted their accounts, one executing his notes to the others: *Held*, that the vice of illegality would not fol-

If a partnership is illegal, shares in it cannot be recognized, and contracts for the sales of such shares are themselves illegal. Therefore, a broker employed to buy shares in an illegal company cannot recover the price he may have paid for them from the person from whom he bought them (*y*); nor can the buyer, if he has paid the broker, and the shares have been bought, recover back any part of the money so paid, although the broker may have been guilty of a fraudulent overcharge. (*z*) But if the purchaser of the shares has paid the broker for them, the broker cannot retain the money against the seller. (*a*) [1]

Sales of shares of an illegal company.

*Again, as a contract for the sale of shares in an illegal company is itself illegal, it follows that a purchaser of such shares, who may have paid for them, cannot recover back his money if it should ultimately turn out that the company is no company at all, but a project which has failed. (*b*) *199

In the next place, if a firm is illegal, its members cannot maintain any action in respect of any transaction tainted with the illegality.[2] For example, if a partnership is formed for selling smuggled goods, it cannot recover the price of any smuggled goods which it may have sold. (*c*) But it is con-

Actions by an illegal partnership.

low into the notes, nor be a defense to an action thereon. DeLeon *v.* Trevino, 49 Tex. 89.

If a part of a partnership business be legal and a part illegal, the court, in an action to settle the affairs of the partnership, may take charge of which is legal, and appoint a receiver therefor. Anderson *v.* Powell, 44 Iowa, 20.

One cannot sustain an action against his partner for an account and recovery of profits made in Confederate money transactions; nor can such an action be sustained in respect of profits which may have been realized on dealings of a lawful character, when the latter were so blended with Confederate money dealings that it is impossible to so separate the one class from the other as to give effect to the legal transactions alone. Zane *v.* Thomas, 37 Tex. 157. See, however, to the contrary, Pfeiffer *v.* Maltby, 38 Tex. 523.

(*y*) Josephs *v.* Pebrer, 3 B. & C. 639. The illegality in this case was apparently treated as obvious.

(*z*) Buck *v.* Buck, 1 Camp. 548.

(*a*) Bousfield *v.* Wilson, 16 M. & W. 185.

[1] See Ewell's Evans on Agency, 37, *327, notes.

(*b*) See Kempson *v.* Saunders, 4 Bing. 5.

[2] Where persons enter into a co-partnership with the fraudulent purpose of hindering or delaying the creditors of one of the parties in the collection of their debts, such persons cannot maintain an action of trespass *quare clausum fregit* jointly against a person who forcibly enters the storehouse and seizes the goods. McPherson *v.* Pemberton, 1 Jones L. 378.

(*c*) See Biggs *v.* Lawrence, 3 T. R. 454.

ceived that even an illegal partnership could prosecute a person stealing its property. (*d*)

Actions against an illegal partnership.

The illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by any person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm (*e*); but the illegality of the firm does not *per se* afford any answer to a demand against it, arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causa non oritur actio;* and he, not being implicated in any illegal act himself, cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership. (*f*)

So, if a partnership or company has been established by fraud, and persons have been induced to join it by false and fraudulent representations, still the fraud so perpetrated, affords no answer to a creditor of the firm (*g*), unless that creditor has himself been party to the fraud (*h*) Moreover, where a company has been *200 established by fraud, and where it has been *engaged in illegal transactions, the innocent shareholders are nevertheless liable amongst themselves to contribute if necessary to the payment of the debts of the company; for such shareholders are not so *in delicto* as to preclude any one of them from calling on the others to share the losses to which he and they are liable. (*i*)

Actions for contribution, &c.

The most important consequence, however, of illegality in a contract of partnership is, that the members of the partnership have no remedy against each o her for contribution or apportionment in respect of the partnership dealings and transactions.[1] However ungracious and morally reprehensible

(*d*) See R. *v.* Frankland, L. & C. 276; 9 Jur. N. S. 388; 32 L. J. M. C. 69.

(*e*) South Wales Atlantic Steamship Co. 2 Ch. D. 763.

(*f*) See the judgment of Mellish, L. J., in the last case, and Brett *v.* Beckwith, 3 Jur. N. S. 31, M. R.

(*g*) Henderson *v.* The Royal Brit. Bank, 7 E. &. B. 356.

(*h*) See Batty *v.* M'Cundie, 3 C. & P. 203.

(*i*) See Longworth's Ex. case, Johns. 465, affirmed 1 De G. F. & J. 17.

[1] Where articles of partnership contemplate the sale of liquors, and stock on dissolution contains them, and on settlement one partner is charged the price of them, and authorized to pay certain debts incurred in their purchase, the other partner, when sued for con-

it may be for a person who has been engaged with another in various dealings and transactions to set up their illegality as a defense to a claim by that other, for an account of them and for payment of his share of the profits made thereby, such a defense must be allowed to prevail in a court of justice. Were it not so, those who —*ex hypothesi*—have been guilty of a breach of the law, would obtain the aid of the law in enforcing demands arising out of that very breach; but not only would all laws be infringed with impunity, but, what is worse, their very infringement would become a ground for obtaining relief from those whose business it is to enforce them. For these reasons, therefore, and not from any greater favor to one party to an illegal transaction than to his companions, if proceedings are instituted by one member of an illegal partnership against another in respect of the partnership transactions, it is competent to the defendant to resist the proceedings on the ground of illegality. (*k*) There are, indeed, some old cases in which this defense was not allowed to prevail (*l*); but they have been long overruled. (*m*) Moreover, if the illegality is brought to the notice of the court, it will of its own accord decline to interfere between the parties, although there may be no desire on their part to urge such an objection. (*n*)

Waiver of illegality.

When partnerships of marine insurers were illegal, it was *held that if one member of a firm of such insurers paid all *201 the losses sustained by the firm, he could not recover any part of the money paid from his copartners (*o*); and that if the premiums were received by one only, the others could not obtain their shares from him. (*p*) So, where there was an express covenant to pay such shares, the covenant was held to be invalid by reason of the illegality which tainted it (*q*); and even where an arbitrator had awarded what was to be paid by one partner to the other, it was held that the award could not be enforced. (*r*) These cases are of undoubted authority, and are al-

Illegality a defense at law.

tribution, cannot set up the liquor law in defense of the items paid for such debts. McGunn *v.* Hamlin, 29 Mich. 476.

(*k*) See Holman *v.* Johnson, 1 Cowp. 243; Thompson *v.* Thompson, 7 Ves. 470; Cousins *v.* Smith, 13 Ves. 544.

(*l*) Dover *v.* Opey, 2 Eq. Ca. Ab. 7; Watts *v.* Brooks, 3 Ves. 611.

(*m*) See the cases cited *infra*.

(*n*) Evans *v.* Richardson, 3 Mer. 469.

(*o*) Mitchell *v.* Cockburn, 2 H. Blacks, 380.

(*p*) Booth *v.* Hodgson, 6 T. R. 405.

(*q*) Lees *v.* Smith, 7 T. R. 338.

(*r*) Aubert *v.* Maze, 2 Bos. & P. 371.

ways referred to as such, although the particular ground of illegality on which they rested no longer exists. It has indeed been held, in one or two cases of illegal partnership, that if one partner has paid losses at the special request of the other, who promised to pay his share afterwards, an action for such share may be sustained (*s*); but these cases cannot be reconciled with others, and must be taken to be overruled. In De Begnis *v.* Armistead (*t*), the plaintiff and the defendant entered into an illegal agreement for bringing out an opera and dividing the profits arising from it. By the agreement the plaintiff was to pay the singers, and the defendant was to provide a theater and pay the dancers. This was done; but instead of profits, there were losses, and on the whole account a balance was found due to the plaintiff. A bill for the balance was given by the defendant, and it was proved that the balance was made up of different sums paid by the plaintiff at the defendant's request. It was nevertheless held that the original agreement being illegal, the plaintiff could not recover the balance in question, either on the bill or the common money counts.

De Begnis v. Armistead.

Illegality a defense to an account.

Nor can an action for an account be sustained by one member of an illegal partnership against another, in respect of its dealings and transactions. (*u*)

*202 *Ewing *v.* Osbaldiston (*x*) is a strong instance of this. There the plaintiff and the defendant agreed to become partners in a theater. The plaintiff advanced part of the money he had agreed to advance, and the defendant applied it in part payment for a lease of the theater. The lease was afterwards assigned to him alone. The defendant did not perform his part of the agreement, and the plaintiff accordingly filed a bill against him. The bill prayed that it might be declared that the plaintiff and the defendants were partners in the theater, and in the lease thereof, and that the agreement made between the plaintiff and the defendant might be performed, and, if necessary, that the partnership might be dissolved, and the usual accounts taken. The agreement, however, was illegal, by 10 Geo. 2, c. 28, and the bill was dismissed with costs; an appeal was dis-

Ewing v. Osbaldiston.

(*s*) See Petrie *v.* Hannay, 3 T. R. 418; Faikney *v.* Reynous, 4 Burr. 2070.

(*t*) De Begnis *v.* Armistead, 10 Bing. 107. See Fisher *v.* Bridges, 3 E. & B. 642, reversing S. C. 2 ib. 118.

(*u*) Knowles *v.* Haughton, 11 Ves. 168; Armstrong *v.* Armstrong, 3 M. & K. 45; Harvey *v.* Collett, 15 Sim. 332.

(*x*) 2 M. & Cr. 53.

missed with costs, also. It was decided on appeal, that the agreement being illegal, it was impossible for the Court to decree its specific performance; and that if the plaintiff sought to recover back the money he had paid, he could not do so in that suit, as (even if he had a lien on the property for the money, which the Court denied), the bill did not seek to enforce such lien.

Moreover, if it can be shown that the purpose with which a partnership was formed was illegal, the consequences of illegality will follow, however skillfully the true purpose may have been concealed (*y*); and parol evidence may be given to show the existence of the illegality, however formally the partnership agreement may have been drawn up, and however successful the parties may have been in making that agreement legal on the face of it. (*z*)

Concealed illegality.

In order, however, that illegality may be a defense, it must affect the contract on which the plaintiff is compelled to rely, in order to make out his right to what he asks.[1] It by no means follows, from the circumstance that money has been obtained in breach of some law, that therefore whoever is in possession of such money is entitled to keep it in his own pocket.

Illegality, when not a defense.

*Tenant *v.* Elliott (*a*), and other cases, decided that if A. and B. are parties to an illegal contract, and B. in pursuance thereof pays money to C. for A.'s use, A. can recover this money from C. It follows from this that if two partners, A. and B., enter into an illegal agreement with C., and in pursuance of this agreement C. pays money to D. for the use of A. and B., not only can A. and B. recover this money from D., but if he pays it over to either one of the two partners, that one must account to the other for his share of it. This must also be the *203

Tenant *v.* Elliott.

(*y*) Stewart *v.* Gibson, 7 Cl. & Fin. 707; Armstrong *v.* Armstrong, 3 M. & K. 53.

(*z*) See Collins *v.* Blantern, 2 Wils. 341, and 1 Sm. L. Ca. and the notes there.

[1] When one partner, without the knowledge of the other, borrows money at usurious interest, and executes a note in the name of the firm, and afterwards pays the usurious interest, and the other partner, ignorant of the payment of the usury, executes his own note in lieu of the other, he cannot, when sued upon it, set up as a defense the payment of usury by his partner. Jones *v.* Jackson, 14 Ala. 186.

(*a*) Tenant *v.* Elliott, 1 Bos. & P. 3; Farmer *v.* Russell, ib. 296; Bousfield *v.* Wilson, 16 M. & W. 185; Nicholson *v.* Gooch, 5 E. & B. 999.

case if C., instead of paying the money to D., pays it over at once to A. or B. In other words, it follows from Tenant *v.* Elliott and that class of cases, that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the partnership from such act, and the money representing that gain has been actually paid to one of the partners, for the use of himself and co-partners, he cannot set up the illegality of the act from which the gain accrued as an answer to a demand by them for their share of what he has received.[1] Upon this principle it was held in Sharp *v.* Taylor (*b*), that a partner was entitled to an account against his co-partner of monies actually come to the hands of the latter, from the employment of a ship in a manner not permitted by the navigation laws; and in Sheppard *v.* Oxenford (*c*) that the directors of an illegal company were liable to account for the money received by them on behalf of the company and for the use of its members.

Sharp v. Taylor.

Sheppard v. Oxenford.

An executor or administrator of a deceased partner cannot protect himself from accounting for the estate of the deceased by setting up against his creditors, legatees, or next of kin, the illegality of the transactions in which the deceased may have been concerned. (*d*) That has nothing to do with their claims; and the reasons upon which the maxim *ex turpi causâ non oritur actio* is founded, evidently have no application to such *a case. Even if the executor was one of the deceased's copartners, and was thus mixed up with him in the illegal transactions, still if the share of the deceased in the gains arising from them has actually been placed to his credit in the partnership books and has come or might have come to the hands of the executor as such, he must account for that share. (*e*) But if there has been no account settled, it would seem that the executor may in his character of partner rely on illegality, and decline to come to any account in respect of the gains in question. (*f*)

Illegality set up by executors.

*204

But notwithstanding Tenant *v.* Elliott, Sharp *v.* Taylor, and other cases of that class, it is settled that if money comes to the hands of a person in trust for another, the *cestui*

Illegal trusts.

[1] See *ante*, p. 198, note.

(*b*) 2 Ph. 801, recognized in Sheppard *v.* Oxenford, 1 K. & J. 491.

(*c*) 1 K. & J. 491. See, too, Butt *v.* Monteaux, ib. 98.

(*d*) See Joy *v.* Campbell, 1 Sch. & Lef. 339; Hale *v.* Hale, 4 Beav. 369.

(*e*) See Joy *v.* Campbell, 1 Sch. & Lef. 328.

(*f*) See Ottley *v.* Browne, 1 Ball. &

que trust cannot recover such money if the trust which he seeks to enforce is itself illegal. Thus in Ottley *v.* Browne (*g*), A., who was a shareholder with B. and others in two companies, wished to become a banker; and in order to evade a statute which rendered it illegal for a banker to be a partner in commercial undertakings (*h*), A. assigned his shares to B. in trust for himself. B., who carried on a separate trade, was made bankrupt, and his assignees sold all his shares in the above companies, and also the shares held by him in trust for A. A. then filed a bill against B.'s assignees, praying that they might be declared trustees of these last shares for him, A., and that they might be ordered to pay the value thereof to him, or that he might be at liberty to prove for such value against B.'s estate; but the bill was dismissed with costs, on the ground that it sought to enforce a secret trust, which was directly against a positive law. (*i*) Ottley v. Browne.

Before quitting the subject of the consequences of the illegality of a partnership or company, the risk of criminal prosecution ought to be mentioned. Persons engaged in an illegal business are liable, whether partners or not, and whether *incorporated or not, to be punished criminally (*k*); and even where the object of the company is not illegal, directors will do well to bear in mind, that if they willfully violate the provisions of an act of Parliament they are in strict law guilty of a misdemeanor and liable to be indicted accordingly. (*l*) Indictment. *205

Bea. 360; and compare Sharp *v.* Taylor, 2 Ph. 801.

(*g*) 1 Ball. & Bea. 360, and see *Ex parte* Mather, 3 Ves. 373.

(*h*) 29 Geo. 2, c. 16 (Irish).

(*i*) The same principle is illustrated by Thomson *v.* Thomson, 7 Ves. 470, which, however, was not a partnership case.

(*k*) See the title Conspiracy in Russell on Crimes, and Archbold's Criminal Law.

(*l*) See Lord Campbell's observations in Longworth's Ex. case, 1 De G. F. & J. 31.

*206 # *CHAPTER VII.

OF THE GENERAL NATURE OF A PARTNERSHIP.

SECTION 1.—OF THE MERCANTILE AND LEGAL NOTION OF A FIRM.

PARTNERS are called collectively a firm. Merchants and lawyers have different notions respecting the nature of a firm. (a) Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, *i. e.* as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the *firm* is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the *firm* for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions; but are always either debtors to or creditors of the firm.

Mercantile view of a firm.

Owing to this impersonification of the firm, there is a tendency to regard its rights and obligations as unaffected by the introduction of a new partner, or by the death or retirement of an old one. Notwithstanding such changes among its members, the *firm* is considered as continuing the same; and the rights and obligations of the old firm are regarded as continuing in favor of or against *207 the new firm as if no changes had *occurred. The partners

(a) See on this subject Cory's Treatise on Accounts (2d ed. 1839, Pickering), a valuable work, but, it is believed, not so widely known as it should be. See, too, a paper by J. M. Ludlow, Esq. "On the mercantile notion of the firm, and the need of its legal recognition," in the 2d vol. of the papers read before the Juridical Society, p. 40. To both of these the writer desires to acknowledge his obligations.

are the agents and sureties of the firm: its agents for the transaction of its business; its sureties for the liquidation of its liabilities so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets.

But this is not the legal notion of a firm. The firm is not recognized by lawyers as in any way distinct from the members composing it. (*b*)[1] In taking partnership accounts and in administering partnership assets, Courts have to some extent adopted the mercantile view, and actions may now be brought by or against partners in the name of their firms (*c*); but speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member. (*d*)

Legal view of a firm.

A member of an ordinary partnership is at law, as in commerce the agent of the firm for the purpose of transacting its business; but he is not the surety of the firm. Every member of an ordinary partnership, however numerous the partners may be, is liable to have his private property seized for a partnership debt, whether the firm has assets to pay it or not; and not only so, but the property of the firm is liable to be seized for the private debts of any of the partners composing it. (*e*) This non-recognition of the firm, in the mercantile sense of the word, is one of the most marked differences between partnerships and incorporated companies.

(*b*) Hoare *v.* Oriental Bank Coporation, 2 App. Ca. 589, illustrates this.

[1] Authority to tax all persons exercising any profession, may be executed by taxing each member of a law firm separately. The member cannot require that the firm shall be taxed and not himself, though he does not practice otherwise than as a partner. Lanier *v.* The Mayor, 59 Ga. 187.

(*c*) Jud. Act, 1875, Ord. xvi. rule 10.

(*d*) See Lord Cottenham's judgment in Richardson *v.* The Bank of England, 4 M. & Cr. 171, 172; and De Tastet *v.* Shaw, 1 B. & A. 664.

(*e*) See Execution, in book ii. ch. 3, § 4.

*208 *SECTION II.—CONSEQUENCES OF THE NON-RECOGNITION OF THE FIRM IN THE MERCANTILE SENSE.

Generally as regards its name.

Name of a firm.

It follows from the foregoing remarks, that the name under which a firm carries on business is in point of law a conventional name applicable only to the persons who, on each particular occasion when the name is used, are members of the firm. (*f*) When a firm is spoken of by its name or style, evidence is admissible to show who in fact constituted the firm at the time in question (*g*): and if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name, is as valid as if real names had been used.[1] This is

(*f*) A firm is usually described in legal proceedings as certain persons trading or carrying on business under, and using the name, style, and firm of, &c. As to the sufficiency of this description, see Smith *v.* Ball, 9 Q. B. 361.

(*g*) Carruthers *v.* Sheddon, 6 Taunt. 15; Bass *v.* Clive, 4 M. &. S. 13; Stubbs *v.* Sargon, 2 Keen. 255, and 3 M. & Cr. 507; Latouche *v.* Waley, Hayes & Jones (Ir. Ex.), 43.

[1] The parties to a co-partnership may give it just such a name as they please, and all contracts or obligations or notes, made with or given to such firm, may be prosecuted in the individual names of its members. Crawford *v.* Collins, 45 Barb. 269; S. C. 30 How. Pr. 398.

A firm may do business under the name of one of the partners alone, and can sue in all their names on contract made in the name of such one alone. Martin *v.* Johnson, 8 Daly, 541.

A company claiming to have been incorporated under the laws of another State, commenced doing business in this State, under its assumed corporate name; subsequently another company became incorporated by the same corporate name as the former, under the laws of this state, and commenced business in the same city in which the former company was already established. The company organized under the laws of this state sought to restrain the persons composing the other company from continuing to do business under the corporate name, alleging that the defendants' pretended corporation no longer existed; but it was *held*, that was not sufficient ground for the relief sought. If the defendants were no longer incorporated, or if their original organization as a corporation was illegal, they still had a right to prosecute their business as partners, and under any name they might adopt. Ottoman Cahvey Company *v.* Dane, 95 Ill. 203.

Persons doing business under a corporate name, if not a corporation, are, it is said, a partnership. Holbrook *v.* St. Paul F. & M. Ins. Co. 25 Minn. 229.

The mere fact that an abbreviated form, as "Chas. & Wm. Feickert," instead of "Charles Feickert and William Feickert," is used in describing the payees of a note, does not as a matter of law authorize the public to assume they were partners. Ryhiner *v.* Feickert, 92 Ill. 305.

seen every day in the case of bills of exchange and promissory notes; and even in the case of more formal instruments, there is no doubt of their validity, although some of the executing parties may be described as A. & Co.[2] (*h*) So partners may be registered

It is not necessary that a firm name should be agreed upon in partnership articles. If there was evidence of an agreement to buy and sell on joint account for mutual profit, and if one, with the knowledge and assent, express or implied, of the other, was in the habit of using a certain name, it is sufficient to fix the liability of the firm upon a note signed with that name. Parsley *v.* Ramsey, 31 Ga. 403.

It is not necessary that two firms in different localities, entering into an agreement, in express terms creating a partnership for the carrying on of a special business, should adopt any partnership or firm name. Wright *v.* Hooker, 10 N. Y. 51.

There is no presumption of law or fact, that a firm name includes more than one person; and if it is desired that the names of plaintiffs should be shown, the fact of partnership must be put in issue by verified plea. Robinson *v.* Magarity, 28 Ill. 423.

The use of "and company" after a firm name creates a presumption that there is a partner not named, which, however may be overcome by positive proof. Whitlock *v.* McKechnie, 1 Bosw. 427.

In New York, the use of a firm-name, not representing actual existing partners, is by statute made illegal, except by the remaining members of a former firm who shall file a certificate with the county clerk, showing who the remaining partners are, etc. A firm cannot enforce a contract made by them while using such illegal firm name. Lunt *v.* Lunt, 10 N. Y. Wkly. Dig. 329.

Where a husband and wife had formed a partnership and done business under the name of A. & Co.: *Held*, that they had not violated the statute (L. 1833, c. 281), to prevent persons from transacting business under fictitious names, and that they could recover in a suit in their joint names for goods sold and delivered by them in such partnership name. Zimmerman *v.* Erhard, 8 Daly, 311.

[2] Upon the formation of a partnership, until a firm-name is adopted the presumption must be, that in the transaction of the firm business, each member is the agent of the others to transact the business, even to the signing of the names of the several members of the firm to writings executed in the legitimate business of the firm. Kitner *v.* Whitlock, 88 Ill. 514.

By a partnership agreement between two, no firm-name was expressly adopted, but one partner was to give his personal attention to and have entire control and management of the business, with authority to arrange and negotiate the acceptance of drafts, the other to incur no risks and to assume no responsibility: *Held*, that it might be inferred that the co-partnership business was to be done in the name of the first partner, and the other be held liable upon a draft drawn by him in his individual name, procured to be discounted by him for the benefit of the firm, and avails applied to its use; although at the time the draft was discounted the second partner was not known to the payee as such. Ontario Bank *v.* Hennessey, 48 N. Y. 545.

(*h*) See Maugham *v.* Sharpe, 17 C. B. N. S. 443, a mortgage; Brutton *v.* Burton, 1 Chitty, 707, a warrant of attorney; Evans *v.* Curtis, 2 C. & P. 296, an agreement for a lease; Moller *v.* Lambert, 2 Camp. 548, a bond;

as shareholders in the name of their firm (*i*); and under the Copyright in Engravings act, 8 Geo. II. c. 13, § 1, it is sufficient to print the name of the firm of proprietors under the engravings. (*k*)

But as the name of a firm is only a conventional mode of designating the persons composing it, any variation amongst these persons is productive of a new signification of the name. *If therefore, a legacy is left to a firm, the legacy is payable to those who compose the firm at the time the legacy vests (*l*); and if a legacy is left to the representatives of an old firm, it will be payable to the executors of the survivors of the partners constituting the firm alluded to, and not to its successors in business. (*m*)

Effect of change amongst the partners.

*209

Legacy to a firm.

Again, if trustees are authorized to lend money to a firm, and, after the death or retirement of one of the members, the trustees lend to the remaining members, this, it seems, would be a breach of trust on the part of the trustees. (*n*)

Advances to a firm.

An authority given to two partners to insure in their names does not authorize an insurance in the names of themselves and a third person afterwards taken into partnership with them. (*o*) So, if there be a firm, A. B. and C., and it has an agent D., and C. retires from the firm, though D. may continue the agent of the firm, he is no longer the agent of C., but only of A. and B. (*p*)[1] In Tasker *v.*

Agency.

Gorrie *v.* Woodley, 17 Ir. Com. L. Rep. 221, a guarantee; Latouche *v.* Waley, Hayes & Jones (Ir. Ex.) 43. How far the firm is bound by instruments on which its true name does not appear, will be seen hereafter; and see as to the parties to sue on a covenant with a firm, Metcalf *v.* Rycroft, 6 M. & S. 75, noticed *infra*, book ii. ch. 3.

(*i*) Weikersheim's case, 8 Ch. 831.

(*k*) Rock *v.* Lazarus, 15 Eq. 104.

(*l*) See Stubbs *v.* Sargon, 2 Keen. 255, and 3 M. & Cr. 507. In Mayberry *v.* Brooking, 7 De G. M. & G. 673, a legacy of a debt due to A. was held to pass A's interest in a debt due to him and his co-partners. See, also, *Ex parte* Kirk, 5 Ch. D. 800.

(*m*) Leak *v.* M'Dowall, 3 N. R. 185, M. R.; Kerrison *v.* Reddington, 11 Ir. Eq. 451. See Greville *v.* Greville, 27 Beav. 594.

(*n*) See Fowler *v.* Raynal, 2 De G. & Sm. 794, and 3 M. & G. 500.

(*o*) Barron *v.* Fitzgerald, 6 Bing. N. C. 201. But of course a continuance of the authority may be inferred from the dealings of the person giving it with the changing firms. See Pariente *v.* Lubbock, 8 De G. Mc. & G. 5.

(*p*) See Jones *v.* Shears, 4 A. & E. 832.

[1] The agent of a partnership is not the agent of the partners individually, but of the firm collectively. Johnston *v.* Brown, 18 La. Ann. 330.

A revocation of the agency is effected by the death of the principal or a member of the firm, even though the agency arises from the fact of the existence of a

Shepherd, two partners had appointed an agent for four years and a half. One of the partners having died before the expiration of that time, it was held that the surviving partner was under no obligation to continue the agent in his employ. The Court held that the appointment had reference to the existing partnership only, and that the contract was intended to be for four years and a half, provided the parties so long lived. (*q*)[1]

Offices held by a firm.

Upon the same principle—namely, that the firm is not distinguishable from its members, and that the name of the firm is only a conventional name for those members—if a firm is appointed by its mercantile name to any office, *e. g.*, the office of trustee, guardian or executor, the partners in the house at *the time of its appointment to the office, *210 are the persons who, in point of law, are considered as filling it. (*r*) The firm, as such, cannot hold an office; nor can rights, personal to the members of a given firm, be exercised by new members who may be introduced into it. (*s*)

Name a trade mark.

Although the name by which a firm is known is not the property of the firm, and there is apparently nothing at common law to prevent persons from carrying on business in partnership under any name they please[1] (unless perhaps it pur-

partnership between the principal and agent. Travers *v.* Crane, 15 Cal. 12; Marlett *v.* Jackman, 3 Allen, 287; Johnson *v.* Wilcox, 25 Ind. 182.

See, however, Bank of N. Y. *v.* Vanderhorst, 32 N. Y. 553, where it was held that where an agent of a firm, authorized to draw its moneys from the bank and apply the same to the uses of the firm, continues to do so after the death of one of the members thereof, without knowledge on his part or on the part of the bank, of such death, he acts within the scope of his authority, and his acts bind the firm. See, also, Wilson *v.* Stewart, 5 Pa. L. J. Rep. 450.

So, a dissolution of a partnership revokes a power of attorney given by the firm. Schlater *v.* Winpenny, 75 Penn. St. 321. But a mere change in the name of a firm, when the firm under the new name is composed of the same members as that under the old one, does not revoke an agency conferred upon it. Billingsley *v.* Dawson, 27 Iowa, 210.

(*q*) Tasker *v.* Shepherd, 6 H. & N. 575.

[1] See note 1, *supra*.

(*r*) De Mazar & Pybus *v.* Knudson & Pybus, 4 Ves. 649.

(*s*) See Barron *v.* Fitzgerald, 6 Bing. N. C. 201; Stevens *v.* Benning, 1 K. & J. 168.

[1] See *ante*, p. 208, note.

The law of Louisiana, prohibiting an individual from doing business under a firm name, does not affect a person residing in another State. Succession of Bofenschen, 29 La. Ann. 711.

The fact that the owner and shipper of property is doing business in the name of a firm in violation of the provisions of the act of New York (Chap. 281, Laws of 1833,) "to prevent persons transacting business under fictitious names," and that the property is marked with the firm's name, is no defense to a

ports to be the name of a corporation) (*t*), yet a name may be a trade mark, and, if it is, the use of it by others will be illegal, if they pass off themselves or their own goods, for the firm or the goods of the firm whose name is made use of. (*u*) Moreover, if this is done intentionally, the illegality will not be affected by the circumstance that the imitators of the trade mark are themselves of the same name as those whose mark they imitate. (*x*) But there can be no trade mark without past use. Therefore, where the founder of a bank, called "The Bank of London," sued a rival company, established under the same name, for imitating and passing themselves off as his bank, the action failed on the ground that the plaintiff did not show that he had established himself in business as a banker, so as to entitle him to complain of what the defendants had done. (*y*) Further, if the name of a firm merely describes the nature of its business, it has no right to prevent another firm from carrying on a similar business under a similar name. Upon this principle injunctions have been refused in several cases in which one insurance company has sought to restrain a rival company from using a name resembling its own. (*z*)

*211 *Even in these cases, however, an established name may be imitated so closely as to give those entitled to use it a right to redress. (*a*)

Changes and mistakes in name of a firm.

Speaking generally, the rights and liabilities of a firm cannot be affected by a change in its name unaccompanied by a change amongst its members. Regarded as a trade-mark, and in connection with goodwill, a change in name may be at-

tion by such owner against a railroad corporation for loss of or damage to the property while in transit. The said act being highly penal, will not be extended by implication or construction to cases not within the terms of the act fairly interpreted. Wood *v.* Erie Railway Company, 72 N. Y. 196.

(*t*) See as to this, *ante*, p. 182.

(*u*) See as to names being trade marks, Singer Manufacturing Co. *v.* Wilson, 2 Ch. D. 434; Lee *v.* Haley, 5 Ch. 155.

(*x*) Holloway *v.* Holloway, 13 Beav. 209; Burgess *v.* Burgess, 3 De G. M. & G. 986. See, also, Massam *v.* Thorley's Cattle Food Co. 6 Ch. D. 574.

(*y*) Lawson *v.* The Bank of London, 18 C. B. 84.

(*z*) See The Colonial Life Assurance Co. *v.* The Home and Colonial Assurance Co., 33 Beav. 548; The London Assurance Co. *v.* The London and Westminster Insurance Corporation, 9 Jur. N. S. 843, V. C. S.; The London and Provincial Law Assurance Society *v.* The London and Provincial Joint Stock Life Assurance Co. 17 L. J. Ch. 37, N. S.

(*a*) See the case of the Guinea Coal Co. Lee *v.* Haley, 5 Ch. 155. The Copyright Acts have no application to mere names, see Maxwell *v.* Hogg, 2 Ch. 307.

tended by important consequences, but in other respects it matters little; for so long as there is no change amongst the members, the different names they assume all denote the same persons. It must not, however, be concluded that one partner can bind his co-partners by using a name under which he and they do not carry on business, and the use of which they have not sanctioned; and as will be seen hereafter, he has no power so to bind them. (*b*) Moreover, a mistake in the name of a firm may be important, *e. g.*, under the Copyright Act, if the owners of a copyright carry on business in partnership and are not registered properly, they cannot sue for an infringement. (*c*)

In legal proceedings.

The non-recognition of the firm, in a mercantile sense, was very apparent when it had to sue or be sued at law; for, Actions by and against firms.

1. A firm could neither sue nor be sued otherwise than in the names of the partners composing it. (*d*)

2. Consequently, no action could be brought by the firm against one of its partners, nor by one of its partners against it; for in any such action one person, at least, would appear both as plaintiff and as defendant, and it was considered absurd for any person to sue himself, even in form. (*e*)

*3. For the same reason, one firm could not bring an action against another if there were one or more partners common to both firms. (*f*) *212

So, if one member of a firm drew a bill on the firm, and the bill was accepted in the name of the firm, the drawer could not sue the firm on such a bill; for he, as one of the firm, was liable as an

(*b*) See, as to this, Kirk *v.* Blurton, 9 M. & W. 284, and other cases of that class, noticed *infra*, book ii. Ch. 1, § 5.

(*c*) Low *v.* Routledge, 1 Ch. 42.

(*d*) See *infra*, Actions by and against Partners. A corporation may sue in a name it has acquired by reputation. The Dutch West India Co. *v.* Moses, 1 Str. 612. As to actions by individuals who have assumed to act as a corporation, see Cooch *v.* Goodman, 2 Q. B. 580.

(*e*) De Tastet *v.* Shaw, 1 B. & A. 664; Richardson *v.* The Bank of England, 4 M. & Cr. 171, 172.

(*f*) Bosanquet *v.* Wray, 6 Taunt. 597; Mainwaring *v.* Newman, 2 Bos. & P. 120.

acceptor, and ought, therefore, to be a defendant to the action in which he was plaintiff. (*g*)

But now that there is no difference between rules of law and equity as regards the joinder of parties to actions, it is conceived that actions in such cases could now be sustained. (*h*)

Effect of change in a firm on its rights and liabilities.

Another most important consequence of the principle, that on any change amongst the persons composing a partnership there is in fact a new partnership, and not a mere continuation of the old one, is that although, upon a change in a firm, it may be agreed between the members of the old and new firms that the rights and obligations of the old shall devolve upon the new partners, this has no effect upon third parties unless they accede to it. As to them it is *res inter alios acta*, and there is no principle by virtue of which the existing rights or obligations of non-partners can be affected, either for better or for worse, by agreements to which they are strangers. This subject will be alluded to hereafter. (*i*)

Conduct of one partner a defense to an action by the firm.

The doctrine that a firm is not regarded as distinguishable from the persons composing it, is further illustrated by those cases in which a claim made by a firm has been met by a defense, founded on the conduct of one only of its members. This subject however, will be alluded to hereafter in Book II, Chap. 3.

As regards sureties and securities.

Effect of change in a firm on the position of its sureties.

It is a fundamental principle of the law of suretyship, that any act on the part of the principal creditor which alters the *risk of the surety without his consent discharges him from future liability. (*k*) *213

Sureties to a firm.

If, therefore, a person becomes surety *to* a firm, it is important to ascertain whether he clearly contemplated changes in the firm, and agreed to become surety to a fluctu-

(*g*) See Neale *v.* Turton, 4 Bing. 149. Compare Beecham *v.* Smith, E. B. & E. 442, where the note sued upon was the several note of the defendants.

(*h*) See *infra*, book ii. ch. 3.

(*i*) See *infra*, book ii. ch. 2, § 3.

(*k*) See, as to sureties, the note to Arlington *v.* Merrick, 2 Wms. Saund. 414. As to the discharge of apprentices and their sureties by a change in the firm to which they are bound, see Lloyd *v.* Blackburne, 9 M. & W. 363; R. *v.* St. Martin's, 2 A. & E. 655.

ating body or not. If he did, his liability is not discharged by any change amongst the members constituting the partnership at the time he became surety (*l*); but if no such intention can be shown, then a contract of suretyship entered into with a firm will be deemed to be binding so long only as the firm remains unchanged (see 19 & 20 Vict. c. 97, § 4, on the next page); and consequently any change in it, whether by the death (*m*) or the retirement (*n*) of a partner, or by the introduction of a new partner (*o*), immediately puts an end to the surety's liability so far as subsequent events are concerned. In all such cases the surety's position and risk are altered, and whether he has in fact been damnified by the change or not, he has a right to say *non in hæc fœdera veni*.

Similar doctrines apply to cases where a person becomes surety *for* the conduct of a firm. (*p*)[1] Moreover, a person who becomes surety for another is not necessarily surety for his conduct as a partner, and obviously not for the conduct of himself and his co-partner. (*q*) Sureties for a firm.

*Again, if a person becomes surety to several people for the conduct of a servant in their employ, and those people *214

(*l*) Pease *v.* Hirst, 10 B. & C. 122; Metcalf *v.* Bruin, 12 East, 400, and 2 Camp. 422; and see Barclay *v.* Lucas, 1 T. R. 291; Kipling *v.* Turner, 5 B. & A. 261. In Pariente *v.* Lubbock, 8 De G. Mc. & G. 5, an authority to a firm of consignees, to recognize the consignor's son as his agent, was held to continue, notwithstanding changes in the firm, as long as the consignor continued his business connection with the firm.

(*m*) Holland *v.* Teed, 7 Ha. 50; Strange *v.* Lee, 3 East, 484; Weston *v.* Barton, 4 Taunt. 673; Pemberton *v.* Oakes, 4 Russ. 154; Simson *v.* Cooke, 1 Bing. 452; Chapman *v.* Beckington, 3 Q. B. 703; Backhouse *v.* Hall, 6 N. R. 98, Q. B.

(*n*) Myers *v.* Edge, 7 T. R. 254; Dry *v.* Davey, 10 A. & E. 30; and see Solvency Mutual Guarantee Co. *v.* Freeman, 7 H. & N. 17.

(*o*) Wright *v.* Russell, 2 Wm. Blacks. 934.

(*p*) Bellairs *v.* Ebsworth, 3 Camp. 52; University of Cambridge *v.* Baldwin, 5 M. & W. 580; Simson *v.* Cooke, 1 Bing. 452; 19 & 20 Vict. c. 97, § 4.

[1] Where, after dissolution of the firm of A and B, A assumes as between himself and B payment of a firm debt, and the creditor with knowledge of that arrangement, accepts notes of A postponing the time of payment without the assent of B, *quære* whether B is not to be regarded as having been a mere surety for the debt, and as released by the taking of the notes. Gates *v.* Hughes, 44 Wis. 333.

A surety on a note given after the dissolution of a firm, by one of the members of the firm, in renewal of a note of the firm, on which also he was surety, may recover of the other member of the firm money which he has paid in discharge of the renewal note. Leabo *v.* Goode, 67 Mo. 126.

(*q*) The London Assurance Co. *v.*

are afterwards incorporated, the surety is discharged; for the person created by the act of incorporation is different from the persons in whose employ the servant was, and with whom the surety contracted. (*r*) On precisely similar grounds it is conceived that a person who becomes surety to a corporation for the conduct of one of its servants, would be discharged by the amalgamation of that corporation with another; for the two together would be a different body from either of its amalgamated members. (*s*) But a mere change of name consequent on registration with limited liability has not this effect. (*t*)

Effect of incorporation.

The doctrines established in the foregoing cases have been expressly sanctioned by the legislature; it being enacted by the Mercantile Law Amendment Act, (*u*) that:—

Mercantile Law Amendment Act.

"No promise to answer for the debt, default or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."

Questions nearly akin to those just alluded to, arise where securities have been deposited with bankers to secure future advances, and a change has occurred in the banking firm before the making of some of the advances. *Primâ facie*, the *securities extend only to those advances which were made by the firm whilst its members continued the same as when the securities were deposited. (*x*) And similarly, if a partner pledges his separate property for future advances to be

Effect of change in firm on its securities.

*215

Bold, 6 Q. B. 514; Montifiori *v.* Lloyd, 15 C. B. N. S. 203, where the partnership was known to the surety.

(*r*) Dance *v.* Girdler, 1 Bos. & Pull. N. R. 34.

(*s*) In the Eastern Union Rail. Co. *v.* Cockrane, 9 Ex. 197, and The London, Brighton, and South Coast Rail. Co. *v.* Goodwin, 3 Ex. 320, the surety was not discharged; but the statute amalgamating the two companies contained an express provision on the subject.

(*t*) Groux's Soap Co. *v.* Cooper, 8 C. B. N. S. 800.

(*u*) 19 & 20 Vict. c. 97, § 4. See on this section, Backhouse *v.* Hall, 6 N. R. 98, Q. B.

(*x*) See per Lord Eldon in *Ex parte* Kensington, 2 V. & B. 83.

made to his firm, and he afterwards dies, an advance made after his death to his surviving partners will not be chargeable against the property pledged. (*y*) It has even been held that if a person deposits deeds as a security for advances to be made to *him*, the security does not cover advances made to him and his partners. (*z*)

However, it is established that an equitable mortgage by deposit of title deeds may be extended, even by parol, to cover advances made after a change in the firm with which the deeds are lodged. (*a*) And although a legal mortgage to a firm cannot be converted into an equitable mortgage merely by parol, (*b*) it may be so converted by a written agreement, and may as an equitable mortgage become available as a security for advances made after a change in the firm to which the legal mortgage was originally given. (*c*) Owing to these doctrines a security given to a firm for advances to be made by it, is, upon a change in the firm, readily made a continuing security; and a slight manifestation of intention on the part of the borrower that it should so continue, will enable the new firm to hold the securities until the advances made by itself as well as those made by the old firm, have been repaid. (*d*)

Equitable mortgages.

The lien which a firm of solicitors has on the deeds, &c. of its clients, is not lost by a mere change in the firm. (*e*) But a solicitor's lien only attaches where the papers on which the *lien is claimed have come to the possession of the very persons to whom the client is legally indebted: whence it follows that papers which come into the possession of a firm after the introduction of a new partner (*f*) or the retirement of an old one (*g*) cannot be retained for a debt due before the change in the firm took place. The death of a partner is

Lien of solicitors.

*216

(*y*) Bank of Scotland *v.* Christie, 8 Cl. & Fin. 214.

(*z*) *Ex parte* Mackenna, 3 De G. F. & J. 629; *Ex parte* Freen, 2 Gl. & J. 246. See, too, Chuck *v.* Freen, 1 Moo. & M. 259. These cases turn on the terms of the memoranda of deposit, and on the circumstances under which the securities are given.

(*a*) *Ex parte* Lloyd, 1 Gl. &. J. 389; *Ex parte* Lane, De Gex, 300; and see *Ex parte* Nettleship, 2 M. D. & De G. 124.

(*b*) *Ex parte* Hooper, 2 Rose, 328.

(*c*) *Ex parte* Parr, 4 D. & C. 426.

(*d*) See *Ex parte* Kensington, 2 Ves. & B. 79; *Ex parte* Marsh, 2 Rose, 239; *Ex parte* Loyd, 3 Deac. 305; *Ex parte* Alexander, 1 Gl. & J. 409.

(*e*) Pelly *v.* Wathen, 7 Ha. 351, affirmed 1 De G. Mc. & G. 16.

(*f*) *Re* Forshaw, 16 Sim. 121; Pelly *v.* Wathen, 7 Ha. 351.

(*g*) Vaughan *v.* Vanderstegen, 2 Drew. 409.

not, however, it is conceived, equivalent to retirement, for the survivors become the legal creditors ; and there is, therefore, no reason why they should not have a lien for a debt due to them and their deceased partner on papers coming into their possession after his death.

A dissolution of a partnership between solicitors operates as a discharge by them of their client; and any lien they may have on his papers is subject to his right to have them handed over to a fresh solicitor, for the purpose of enabling him to finish business of the client pending at the time of dissolution. (*h*)[1]

(*h*) Griffiths *v.* Griffiths, 2 Ha. 587; Rawlinson *v.* Moss, 7 Jur. N. S. 1053, V. C. W.

[1] Partnerships between attorneys are subject to the incidents of mercantile partnerships; and one partner is liable upon the contracts made by the other within the scope of the partnership business, and for his negligence in respect to a partnership contract, and a right of action against the firm survives against the survivor alone. Livingston *v.* Cox, 6 Pa. St. 360.

Where a partnership exists between two attorneys, and one of them receives a retaining fee, conducts the trial of the cause and charges the fee therefor on the books of the firm, the presumption will be of a retainer of the firm, and that the fee accrued to the firm. Harris *v.* Pearce, 5 Brad. (Ill.) 622.

If attorneys who are co-partners accept a retainer, the contract is joint, and continues to the termination of the suit, and neither can be released from the obligation or responsibilities assumed, either by a dissolution of their firm, or by any other act or agreement between themselves. Walker *v.* Goodrich, 16 Ill. 341. See, also, Smyth *v.* Harvie, 31 Ill. 62.

A dissolution of a partnership between attorneys does not affect engagements made during partnership, so far as their clients are concerned. Walker *v.* Goodrich, *sup.*

Where a claim was placed in the hands of two attorneys, who were partners, for collection, a judgment obtained, land of the debtor sold under execution, and redemption made from the sale by paying the money to the sheriff, who paid it over to one of the attorneys, and prior to the redemption the copartnership between the attorneys was dissolved: *Held*, that both of the partners were liable to the client for the money thus received by one of them after dissolution. Smyth *v.* Harvie, *sup.*

So, attorneys practicing in partnership are equally responsible for money collected and not paid over, though one of them had no participation in that particular transaction. Dwight *v.* Simon, 4 La. Ann. 490.

An attorney who has received notes for collection is individually responsible for care and diligence in the collection, although he gives his client notice that he has associated with him a partner who attends to the collecting, unless the client has recognized the partnership in the transaction of his business. Mardis *v.* Shackleford, 4 Ala. 493.

When two attorneys are in partnership, and one receives money, demand on him is a demand on both, and renders both liable. McFarland *v.* Crary, 8 Cow. 253.

When two attorneys are in partnership, and one does the business of a cli-

SECTION III.—DIFFERENCE BETWEEN PARTNERSHIPS AND COMPANIES IN THE FOREGOING RESPECTS.

A company which is neither incorporated nor priviledged by the Crown or the Legislature is substantially a partnership; and although the transferability of its shares considerably modifies the application to it of the ordinary law of partnership, still the company, like an ordinary firm, is not in a legal point of view distinguishable from the members composing it; and the statements made in the preceding pages with respect to partnerships are equally applicable to companies which are neither incorporated nor privileged. Companies compared with partnerships.

A company which is incorporated, whether by charter, special act of Parliament, or registration, is in a legal point of view distinct from the persons composing it, and is therefore regarded by lawyers somewhat as a firm is by non-lawyers. It *sues and is sued by a name of its own, and its continuous *217 existence is not affected by changes amongst its members.

A company which without being incorporated is privileged to sue and be sued by the name of some public officer, is as it were, half way between an incorporated company and one of the kind first alluded to. So far as its privileges do not make a difference, the company is a partnership; and so far as its privileges extend, it may without any great inaccuracy be likened to a corporation; for the main object of these privileges is to confer upon the company a sort of continuous existence, whatever changes may take place amongst the individual shareholders.

The consequences of these differences may be inferred from what has been said in the preceding section, and as they will have to be adverted to in detail in other parts of the work, it is unnecessary to draw attention to them, more particularly in the present place.

ent unskillfully, both are liable to him in damages. Warner *v.* Griswold, 8 Wend. 665.

*218

*CHAPTER VIII.

THE DURATION OF A CONTRACT OF PARTNERSHIP AND OF THE CAUSES OF ITS DISSOLUTION.

SECTION I.—OF PARTNERSHIPS AT WILL AND FOR A TERM.

Partnerships at will and for a term.

A CONTRACT of partnership is determinable at the will of any one of the persons who have entered into it, provided it has not been agreed that the contract shall endure for a specified time. In other words, the result of a contract of partnership is a partnership at will, unless some agreement to the contrary can be proved. (*a*)[1] Such an agreement may be established as well by direct evidence as by implication, from the acts of the partners; and it is not possible to lay down any rule by means of which the intention of the partners on this head can be certainly ascertained, where no express agreement has been come to. One or two points, however, on the subject have been decided, and demand notice.

prima facie, partnerships are at will.

Effect of existence of debts.

The mere fact that a firm has incurred debts, and charged its assets for their payment, is no evidence of an agreement that the firm shall continue until its debts are paid, for those debts may be paid as well after as before a dissolution. (*b*)

Effect of taking a lease.

Again, the fact that the partners have, for partnership purposes, taken land on lease for a term of years, is not proof of an agreement that the partnership between them shall subsist for the same period. This has been decided on several oc-

(*a*) See *per* Parke, J., in Heath *v.* Samson, 4 B. & Ad. 175; Frost *v.* Moulton, 21 Beav. 596, and the cases cited in the following notes.

[1] See *post*, p. 220, note.

(*b*) See King *v.* The Accumulative Assurance Co. 3 C. B. N. S. 151.

casions (*c*), and the reasons are thus given by Lord Eldon in *Crawshay *v.* Maule, a leading case upon the subject. "Without doubt, in the absence of express there may be an implied contract as to the duration of a partnership, but I must contradict all authority if I say that whenever there is a partnership, the purchase of a leasehold interest of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument the Court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if the partners purchase a fee simple, there shall be a partnership for ever. It has been repeatedly decided that interests in land purchased for the purpose of carrying on trade are no more than stock in trade." (*d*)

*219 Crawshay v. Maule.

Further, where a partnership, originally entered into for a certain number of years, is continued after their expiration, and there is no evidence as to the additional time for which the partnership was to last, it is treated as having become a partnership at will, and not as having been renewed for another definite period. (*e*) [1]

Partnerships continued after their terms are expired.

So, if one of several partners forms a sub-partnership with a stranger, the fact that the principal partnership has been entered into for a certain number of years is no evidence that the sub-partnership was intended to last for the same

Duration of sub-partnerships.

(*c*) Featherstonhaugh *v.* Fenwick, 17 Ves. 307; Jefferys *v.* Smith, 1 Jac. & W. 301; Alcock *v.* Taylor, Taml. 506; Burdon *v.* Barkus, 3 Giff. 412, and on appeal, 4 De G. F. & J. 42.

(*d*) Crawshay *v.* Maule, 1 Swanst. 509.

(*e*) Featherstonhaugh *v.* Fenwick, 17 Ves. 307; Booth *v.* Parkes, 1 Moll. 465.

[1] A partnership is none the less ended because the party who, upon final settlement, turned over to the other as cash certain drafts and notes, is to be responsible for his proportion of the debts uncollected thereon, or is afterwards employed by the other in making collections; nor because any specific property of the firm remains unsold, wherein each under the settlement, retains his proportionate share. Sharpe *v.* Johnston, 59 Mo. 557.

In such case, the one employed as collector may be held criminally for embezzlement of proceeds of such drafts or notes converted to his own use. Sharpe *v.* Johnston, *sup.*

By a contract of dissolution, it was provided that one partner was to withdraw, and be paid a proportion of the profits when the estimates were made: *Held*, that such a one was a partner until the estimates were made. Magill *v.* Merrie, 5 B. Mon. 168.

number of years, or for as many of them as were unexpired when the sub-partnership was formed. (*f*)

Implied terms of duration.

On the other hand, in Wheeler *v.* Van Wart (*g*), a company, the duration of which was not expressly fixed, was held to be intended to last at least until after a day appointed in its deed of settlement for the holding of a general meeting. And in Reade *v.* Bentley (*h*), it was considered that an agreement to the effect that a publisher should defray the expenses of a work written by an author, and should receive a percentage on the gross *220 amount of sale, and that the net profits of each edition *should be divided equally between both parties, amounted to an agreement for a joint adventure between the author and the publisher for so long as might be necessary to dispose of a complete edition; and that the publication of every new edition prolonged the partnership until that edition should be disposed of; but that when any edition was exhausted either party was free to discontinue the joint adventure.

SECTION II.—OF THE CAUSES OF THE DISSOLUTION OF AN ORDINARY PARTNERSHIP.

Causes of dissolution.

Disregarding mutual consent on the part of all the partners,[1] and such events, if any, as by the partnership articles may be specially made grounds for a dissolution, the causes

(*f*) Frost *v.* Moulton, 21 Beav. 596.

(*g*) 9 Sim. 193, and better in 2 Jur. 252.

(*h*) 4 K. & J. 656; and 3 ib. 271.

[1] Where articles of co-partnership provided for an annual account to be taken, and the payment to each partner of his share of the net profits, and just before the expiration of the year a dissolution was agreed upon, in which it was stipulated in writing that an account should be taken between the parties, to include only moneys drawn by the parties since "the last preceding settlement," as provided in the articles of co-partnership: *Held*, that the subsequent agreement must be construed with the original articles, and when considered with them required the account to include all of the individual accounts of each partner, whether for moneys received or drawn out, or for any other indebtedness to the firm. Scroggs *v.* Cunningham, 81 Ill. 110.

A provision in an agreement for the dissolution of a partnership, authorizing one of the partners alone "to sell and dispose of the property and assets of the co-partnership, and to settle all its concerns, collect all bills, notes or book-debts due the concern, and for that purpose, or for any other purpose legally connected therewith, to use the co-partnership name," confers upon such part-

of a dissolution of an ordinary partnership may be reduced to the following, viz:—

1. The will of any partner.
2. The impossibility of going on; in consequence of
   - The hopeless state of the partnership business.
   - Insanity.
   - Misconduct and destruction of mutual confidence.
3. The transfer of a partner's interest.
4. Death.
5. The occurrence of some event which renders the continuance of the partnership illegal.
6. Fraud, vitiating the original contract.

The right to rescind a contract of partnership on the ground of fraud will be considered hereafter, in the Third Book. In the present place the other causes of dissolution will alone be adverted to.

1. *Will of any partner.*

Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases,[1] and the partnership will then be deemed to continue

Dissolution by notice.

ner authority to assign to a third party a book account due to the concern. Stanton *v.* Lewis, 26 Conn. 444.

A contract of dissolution provided that the liquidating partner "should from time to time, as assets may be received," pay to the other a fixed sum, "to place him on equal footing with" the former, who had received a certain sum before dissolution, and divide the surplus in the proportion of one-third to the former and two-thirds to the latter, but the assets proved insufficient to make up the equality: *Held*, that the liquidating partner was bound to pay the other one-third of the deficiency. Lilly *v.* Kroesen, 3 Md. Ch. 83.

Two partners settled their business, each agreeing to take certain accounts and pay certain debts of the firm. One of them, on being compelled to pay a debt which the other had so agreed to pay, brought suit on this agreement: *Held*, that it was not a condition precedent to the plaintiff's right to recover, that he should prove he had paid all the debts which he had assumed by the agreement. Martin *v.* Good, 14 Md. 398.

[1] See Carlton *v.* Cummings, 51 Ind. 478; Skinner *v.* Tucker, 34 Barb. 333; McElvey *v.* Lewis, 76 N. Y. 373; Lawrence *v.* Robinson, 4 Colo. 567; Pine *v.* Ormsbee, 2 Abb. Pr. N. S. 375.

Merely going into chancery, to dissolve an insolvent partnership, does not dissolve it, or vest the assets in the creditors, before decree. Naglee *v.* Minturn, 8 Cal. 540; Marye *v.* Jones, 9 Cal. 335.

The filing of an attachment bill by one member of a firm against the others, has been held to dissolve the firm; not so where a creditor files the bill and at-

only so far as may be necessary for the purposes of winding
*221 up its then *pending affairs. (*i*)[1] This rule applies to ordinary mining partnerships (*k*); and as well where there are many as where there are only a few partners. (*l*) It also applies although one of the partners to whom the notice is given may be a lunatic. (*m*) But, at the same time, it is apprehended that the Court would restrain an immediate dissolution and sale of the partnership property, if it appeared that irreparable mischief would ensue from such a proceeding. (*n*)

taches the property of the firm. Foster *v.* Hall, 4 Humph. 346.

A partnership to continue during the the pleasure of the contracting parties, is strictly a partnership at will. But to enable one partner to dissolve such a partnership at will, the renunciation must be made in good faith, and not at an unreasonable time. Howell *v.* Harvey, 5 Ark. 270.

Renunciation is held not to have been made in good faith where one partner renounces in order to appropriate to himself the profits which the firm is entitled to receive. Howell *v.* Harvey, *sup.*

And it is made at an improper time, when the things are no longer entire, that were of consequence to the partnership, and which should have deferred the dissolution. Howell *v.* Harvey, *sup.*

But such determination cannot operate to defeat rights accrued under it while it was in force. Lawrence *v.* Robinson, 4 Colo. 567.

The partner who breaks off the partnership with an unfair design or for selfish objects, discharges his co-partners from all liabilities to him under the articles, but does not thereby free himself from his obligations to them. Howell *v.* Harvey, 5 Ark. 270.

Two partners cannot bind a third by an agreement for the dissolution of the partnership, and the re-payment of the funds advanced by one of the two, the third partner not being a party thereto. Gansevoort *v.* Kennedy, 30 Barb. 279.

Where a partnership is liable to be dissolved at the will of either party, the consequence of such dissolution is to throw the winding up of their partnership affairs into a court of equity, unless they agree on the mode of settlement. Stevens *v.* Yeatman, 19 Md. 480.

(*i*) Peacock *v.* Peacock, 16 Ves. 50; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Crawshay *v.* Maule, 1 Swanst. 508; *Ex parte* Nokes, cited 1 Mont. Part. 108 n. The Scottish law is the same: see Marshall *v.* Marshall, 3 Ross, L. C. on Com. Law, 611.

[1] Until the affairs of a partnership are settled, and outstanding engagements made good, the partnership must, in contemplation of law, have a continuance so far as as respects the winding up of the concern. Brown *v.* Higginbotham, 5 Leigh, 583.

(*k*) Lees *v.* Jones, 3 Jur. N. S. 954, but not, it is conceived, if carried on on the cost-book principle.

(*l*) Miles *v.* Thomas, 9 Sim. 606; but see as to companies, *infra.*

(*m*) But in such a case the dissolution cannot be carried out without having recourse to an action. See Mellersh *v.* Keen, 27 Beav. 236.

(*n*) See Chavany *v.* Van Sommer, 3 Woodd. Lect. 416, note, and 1 Swanst. 512, note, and Blisset *v.* Daniel, 10 Ha. 493. By the civil law a dissolution made *malâ fide*, and at an unseasonable time, is not allowed. See Pothier, Partn. § 150.

But although a partnership at will may be dissolved by any partner, it by no means follows that he can retain a premium which his co-partner may have paid him, or secure for his own benefit other advantages which he may desire. (*o*)[1]

A notice that the partnership shall be dissolved must, to be effectual, be explicit, and be communicated to all the partners. (*p*) The notice may be prospective. (*q*) A proposal to dissolve on terms which are not accepted, does not amount to a dissolution. (*r*)[2] Nor does a notice that a partner's share has been forfeited; for by such notice it is not intended that the partnership shall be considered as dissolved as to all the partners, but only that the one partner shall have no further interest in it. (*s*) An answer to a bill in chancery has been held sufficient notice. (*t*)

Form of notice.

It has never been determined that a partnership constituted *by deed can only be dissolved either by deed or by operation of law; and it is

*222

Where partnership is constituted by deed.

(*o*) As to the premium, *ante*, p. 71, and as to retaining the benefit of a renewed lease, Clegg *v.* Edmondson, 8 De G. Mc. & G. 787.

[1] The fact that upon entering into the partnership one of the partners paid a bonus for a good will established by the other partner, will not prevent the latter from dissolving the partnership at any time, or render him liable to the former for damages for such dissolution. Carlton *v.* Cummings, 51 Ind. 478.

(*p*) Van Sandau *v.* Moore, 1 Russ. 463; Wheeler *v.* Van Wart, 9 Sim. 193, and 2 Jur. 252, where the notice was left at the office; Parsons *v.* Hayward, 31 Beav. 199, and 4 De G. F. & J. 474.

(*q*) Mellersh *v.* Keen, 27 Beav. 236.

(*r*) Hall *v.* Hall, 12 Beav. 414.

(*s*) See Hart *v.* Clarke, 6 De G. M. & G. 232.

(*t*) Syers *v.* Syers, 1 App. Ca. 174.

[2] One member of a firm gave notice to his co-partner that the connection between them was dissolved, but this was not assented to by the co-partner, and the parties did not afterwards act upon it: *Held*, that it did not operate a dissolution of the firm. Sanderson *v.* Milton Stone Co. 18 Vt. 107.

Where, under articles of partnership prescribing a definite time for the continuance of the partnership, one of the partners serves upon his co-partner a notice that he has dissolved the partnership; such notice cannot be construed as an offer to dissolve so as to be accepted by an allegation contained in an answer in a subsequent action by such partner against his co-partner, whereby the latter declares himself desirous to dissolve the partnership. Smith *v.* Mulock, 1 Robt. (N. Y.) 569; 1 Abb. Pr. N. S. 374.

The following notice of the dissolution of a co-partnership was published: "B having disposed of his interest in the firm of A & Son to A, the firm is this day dissolved, A assumes all the liabilities of the old firm, and for such purpose will use its name, and to whom all debts due to the firm will be paid." This paper was signed by A and B: *Held*, that this paper was itself, if made *bona fide*, a written dissolution of the

apprehended that no deed is requisite.[1] In Doe *v.* Miles (*u*) the question was raised; but as the partners had all signed a notice advertising a dissolution, Lord Ellenborough presumed that it had

partnership, and transfer in writing by B of all his interest in its effects, to A. Armstrong *v.* Fahnestock, 19 Md. 58.

(*u*) 4 Camp. 373, and 1 Stark. 181. In Hutchinson *v.* Whitfield, Hayes (Ir. Ex.), 78, it was agreed that the partnership should be dissolved by deed only; but it was held that an award dissolving the partnership was valid, the submission being under seal.

[1] Where articles of co-partnership, under seal, provide for a dissolution by mutual consent, such dissolution may be shown by parol. Truesdell *v.* Baker, 2 Rich. 351.

Though a partnership be formed by an agreement under seal, still a dissolution actually made by the parties, though not under seal, before the period limited by the agreement for the continuance of the partnership expires, will, in a court of equity, be effectual as between the partners themselves, and as to third persons having notice thereof. Wood *v.* Gault, 2 Md. Ch. 433.

The dissolution of a partnership, formed in writing when it might have been verbally, may be shown by parol. Such evidence no more contradicts the act than parol proof of payment does a promissory note. Gardiner *v.* Bataille, 5 La Ann. 597.

Partnerships formed by parol may be dissolved by parol, and the partner's joint declarations, orally made to the public, are admissible to show such dissolution, though not conclusive. Cregler *v.* Durham, 9 Ind. 375.

The dissolution of a co-partnership may be proved by parol and a certificate signed by one of the co-partners, to the effect that he has purchased the interests of the others, is competent evidence as corroborative of the contract to dissolve. Emerson *v.* Parsons, 46 N. Y. 560.

A valid agreement for a partnership may be made by parol, though, for the purpose of dealing in real estate, or for carrying on the business of mining, and a parol agreement for dissolution or settlement of such partnership is valid and may be enforced. York *v.* Clemens, 41 Iowa, 95; Holmes *v.* McCray, 51 Ind. 358.

A. and H. were partners in a herd of cattle, which were pastured on a public range. In June, 1869, they dissolved the partnership, and corralled and divided all the cattle they could find, and agreed that H. should retain the partnership brand, and A. the partnership ear-mark, and that any cattle which had the partnership brand and ear-mark after the expiration of one year should belong to A., and that, in the meantime, they should make divisions, and alter the ear-mark of cattle coming to H. and the brand of those coming to A: *Held*, that all that was to be done under the contract was to be performed within one year, and that it was not, therefore, in violation of the statute of frauds. Hoare *v.* Hindley, 49 Cal. 275.

Where an instrument prepared by one partner for signature by his co-partner, with whom he has fallen out and quarreled, contains mutual releases and assignments—each being the consideration of the other—it should, in order to be binding, be signed by both parties. The fact that the partner who did not prepare it has taken, without objection from the other, an unsigned counterpart after his other partner had signed the first counterpart, and left it in the hands of a third person to be delivered only when the unsigned counterpart was signed and delivered, does not give effect to the release. Ambler *v.* Whipple, 20 Wall. 546.

been effected with all due solemnity. It is clear from the report that there was, in fact, no deed of dissolution, but there may have been in the articles some clause providing for a dissolution otherwise than by deed.

A dissolution of a partnership at will may be inferred from circumstances, *e. g.*,[1] a quarrel, although no notice to dissolve may have been given. (*x*) Dissolution inferred.

A notice once given cannot be withdrawn without consent. (*y*) Withdrawal of notice.

Upon the dissolution of a co-partnership between the plaintiffs and the defendant, the former executed an instrument to which the latter was not a party at the time, reciting his withdrawal from the firm, and providing for his receiving certain sums of money and notes, and fixing his liability to share in certain eventual losses of the old firm. Four days after the date of this instrument, the defendant executed a receipt acknowledging the reception of certain notes and cash under the agreement in question. *Held*, that the effect of this receipt was to subject the rights and liabilities of the defendant as effectually to the operation of the preceding instrument as if he had signed it. Buchanan *v.* Cheseborough, 5 Duer, 238.

The articles of an association, providing that "any member, by surrendering his certificate of membership to the storekeeper, may draw from the store in goods a sum not exceeding $4, such certificate to be returned when the amount thus drawn shall have been paid, if paid within thirty days," were *held* to furnish a method by which a member could withdraw from the association, and be absolved from all liability as between himself and the association, considering the objects of the association, and the fact that any one might become a member, with the consent of the directors, on the payment of $5. Stimson *v.* Lewis, 36 Vt. 91.

If, upon dissolution, one or more of the partners agree to take the assets of the firm and assume all its liabilities, and it turns out that they have made an improvident contract, a court of equity will not relieve them of their own voluntary act. Bankhead *v.* Alloway, 6 Coldw. 56.

Where one partner is bound to attend personally to the business of the firm, and afterwards becomes infirm in mind by reason of intemperance, a court of equity will not be authorized to set aside an agreement then made for the dissolution of the concern on the ground of fraud and imposition, when that is to be

(*x*) Pearce *v.* Lindsay, 3 De G. J. & Sm. 139.

(*y*) Jones *v.* Lloyd, 18 Eq. 265.

[1] Evidence that A. and B. were partners in the spring of 1835, and continued doing business under the firm of A. & B. till July or August of the same year, and that the firm was then discontinued, and a new one formed under the style of A. B. & Co. who continued to do business in the same store occupied by A. and B., is evidence tending to prove a dissolution of the partnership of A. and B. Southwick *v.* Allen, 11 Vt. 75.

Certain members of a firm formed a new partnership, and immediately opened an account against one of the others whose name ceased to appear on the books after the settlement of the account a year following. He died about

2. *Impossibility of going on.*

Impossibility of going on.

Even if the duration of the partnership is defined, circumstances may arise giving a partner a right to have the partnership dissolved before the expiration of the time for which it was originally agreed to last. But it is clear that there must be some special circumstance to justify a dissolution of a partnership before the term for which it was entered into has expired. (*z*)[1] Any circumstance, however, which renders the con-

inferred only from the fact that profits have been realized, when loss was anticipated. Atwood *v.* Smith, 11 Ala. 894.

As to the reformation in equity of an agreement for a dissolution, see Leroy *v.* Lowber, 1 Abb. Pr. 67.

Two partners agreed, in writing, to dissolve, and that one should leave and renounce the signature of the house, and the other assume the business and the settlement of debts, and be responsible to the retiring partner for what should be coming to him: *Held*, not a mere assignment in trust to convert the assets to money, and pay the retiring partner his share The remaining partner became owner of the assets, and was personally responsible to the other, but not as a trustee. Weber *v.* Defor, 8 How. Pr. 502.

An instrument given by one partner to his co-partners, certifying that he had purchased their interest in the firm, and agreeing to assume all liabilities of the firm and hold them harmless, is some evidence that the partnership was dissolved on the day of its date. Emerson *v.* Parsons, 2 Sweeny, 447.

[1] See the general rules governing the subject, stated in Waterbury *v.* Express Co. 50 Barb. 169; S. C. 3 Abb. Pr. N. S. 163.

Where articles of partnership prescribe a specified period of its continuance, no partner can, by any voluntary act, work its dissolution, unless the act be such that the subject-matter of the partnership becomes extinct, or the capacity of the partner to give his personal attention is gone. But other voluntary acts may be sufficient to authorize a court to decree dissolution on application of the other partners; and the court may, on the application of even the party committing such acts, decree a dissolution, if other causes justify it, and

---

seven years after the formation of the new firm, never having claimed any interest in the partnership after that time, and there was no evidence that he considered himself, or was considered by others, as a partner. By the said settlement he discharged, a year before its maturity, his proportion of a debt against which, had he continued a partner, he would have been entitled when it became due, to set off his proportion of the profits of the partnership property: *Held*, that under the circumstances the court would presume that his interest in the partnership was relinquished. Gover *v.* Hall, 3 Har. & J. 43.

Whether the facts proved amount to a dissolution of the partnership is a question for the jury, and it is error for the court to decide it. Roache *v.* Pendergast, 3 Har. & J. 33.

(*z*) See Warner *v.* Cunningham, 3 Dow. 76.

tinuance of the partnership, or the attainment of the common end with a view to which it was entered into, practically impossible would seem upon principle to warrant a dissolution. (*a*) The par-

it would be for the benefit of the partnership. Ferrero *v.* Buhlmeyer, 34 How. Pr. 33. See, also, Seighortner *v.* Weissenbosh, 20 N. J. Eq. 172; Howell *v.* Harvey, 5 Ark. 27.

Although partnership articles contain a clause requiring six months notice of an intention to dissolve, and a clause providing for arbitration, a court of equity has jurisdiction in a proper case to entertain a bill for an injunction and a receiver. Page *v.* Vankirk, 1 Brews. 282.

It is error to refuse an application for a writ of partition to divide mills which are partnership property, upon the ground that the time fixed for the dissolution by the articles has not elapsed, if there are equitable grounds for such earlier dissolution. Jackson *v.* Geese, 35 Ga. 84.

F. had a contract to carry the U. S. mail, and the contract expired on the 1st day of July, 1871. About the first of January, 1869, M. bought of F. the said contract for $350, and then sold a half interest therein to C., and M. and C. paid each one-half of the purchase money to F., and agreed between themselves that they would together carry said mail, and share equally in the profits and losses. On the 16th of May, 1870, M. refused to allow C. to have anything further to do with the business, although C. was ready, willing, and offered to do his part; and M. then claimed to have dissolved the arrangement between them, claiming that if it was a partnership, it was at will, and he could dissolve it at pleasure, and himself carry the mail until the close of the contract: *Held*, 1. That there was a partnership between the parties. 2. That from the acts and conduct of the parties, and other surrounding circumstances, the partnership was to continue for a fixed period, to-wit: until the expiration of the contract, which was the sole subject of the partnership. 3. That it was not in the power of M., *sua sponte*, to dissolve the partnership, as he claims he did; and, therefore, that it continued until it expired by limitation, and M. must account to C. for one-half of the profits accruing therefrom. Cole *v.* Moxley, 12 Gratt. 730.

Where a partnership is formed for a definite term, neither partner can file a bill for dissolution of the partnership, or for the appointment of a receiver, before the expiration of the time limited, merely on the ground that he is dissatisfied, or that the partners quarrel. Henn *v.* Walsh, 2 Edw. 129.

But a dissolution will be granted where dissension prevents all hope of advantage. Bishop *v.* Breckles, 1 Hoffm. 534.

A partnership will not be dissolved by decree of court when circumstances render a dissolution inconvenient; *e. g.* when a large operation has been commenced, which cannot be arrested without serious loss. Richards *v.* Baurman, 65 N. C. 162.

Where a dissolution is decreed for breach of the articles of partnership, the court may declare at what date the contract of partnership shall be considered at an end. Dumont *v.* Ruepprecht, 38 Ala. 175.

A court of equity may decree the dissolution of a partnership *ab initio*, on good cause shown. Fogg *v.* Johnston, 27 Ala. 432.

(*a*) See Harrison *v.* Tennant, 21 Beav. 482; Electric Telegraph Co. of Ireland, 22 Beav. 471.

ticular circumstances which have given rise to litigation, and upon which partnerships have been judicially dissolved, are:

1. The hopeless state of the partnership business;

2. The confirmed lunacy of one of the partners; and

*223 *3. Misconduct on the part of one or more of the members of the firm, and the destruction of mutual confidence.

Each of these grounds of dissolution requires to be more fully noticed.

1. *As to the hopeless state of the partnership business.*[1]—In Baring *v.* Dix (*b*) a partnership was formed between three persons for the purpose of spinning cotton under a certain patent. The patented invention proved a failure, and two of the partners thereupon desired to wind up the affairs of the partnership and to sell its mills, but this was opposed by the other partner. However, on a bill filed against him the Court referred it to the Master to inquire and state whether the partnership business could be carried on according to the true intent and meaning of the articles of co-partnership, and declared that, on a report in the negative, a decree would be made for a dissolution of the partnership and a sale of its property. It does not appear in this case whether the partnership had been entered into for a definite time or not, nor whether the capital of the firm had been expended or not.

1. Insolvency. Baring *v.* Dix.

In a more recent and important case, however, the Court recognized the fact that expectation of profit is implied in every partnership, and held that, if a partnership is entered into for a term of years, and the capital originally agreed

Loss of capital. Jennings *v.* Baddeley.

[1] Wherever the conditions of a partnership are incapable of being fulfilled, or the fruits arising from it cannot be properly enjoyed, a good cause for renunciation is furnished. Howell *v.* Harvey, 5 Ark. 270.

The impossibility of carrying on a joint business, profitably, upon the basis of the articles of agreement, is sufficient to authorize either party to demand a dissolution or rescission. Brien *v.* Harriman, 1 Tenn. Ch. 467; Seighortner *v.* Weisenborn, 20 N. J. Eq. 172; Holloday *v.* Elliott, 8 Oreg. 84.

A dissolution will be decreed where the whole scheme is found to be visionary, impracticable, or founded upon erroneous principles. Lafond *v.* Deems, 52 How. Pr. 41; S. C. Abb. N. Cas. 318; Seighortner *v.* Weisenborn, *sup.*

Simple insolvency, without stoppage of payment, or assignment, or any judicial process, does not work a dissolution of the partnership, or divest the partners of their dominion over the partnership property. Siegel *v.* Chidsey, 28 Pa. St. 279; Arnold *v.* Brown, 24 Pick. 89.

(*b*) 1 Cox, 213.

to be furnished has been all spent, and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on except at a loss unless they do, the partnership will be dissolved. (*c*)[1] Under such circumstances as these it is unimportant whether the concern is already embarrassed or not. After everything has been done which was agreed to be done, and certain loss is the only result of going on, any partner is entitled to have the concern dissolved, although he may have agreed that the partnership should continue for some definite time and that time has not yet expired (*d*).

If, in a case of this description, the firm is already insolvent and becomes more and more so every day, the Court will interfere *on motion, and appoint a person to sell the business *224 and wind up the affairs of the partnership, although it is not usual to grant such relief until the hearing of the cause (*e*).

Bankruptcy.

If a firm of partners, or even any one member of the firm, is adjudged bankrupt, the firm is dissolved; not only because it is impossible for the business of the firm to be carried on, but because there is a transfer of each bankrupt's interest to his trustee. (*f*)[1]

(*c*) Jennings *v.* Baddeley, 3 K. & J. 78, a case of a mine.

In an action brought to recover damages for breach of an agreement to continue a partnership for five years: *Held*, that the fact that the whole capital provided for by the articles of copartnership had been lost, was sufficient ground for a refusal by one of the partners to continue the business. Van Ness *v.* Fisher, 5 Lans. 236.

(*d*) Ibid.

(*e*) Bailey *v.* Ford, 13 Sim. 495.

(*f*) See post, p. 229, under the head Transfer of Interest.

[1] See Griswold *v.* Waddington, 16 John. 491; Marquand *v.* N. Y. Manfg. Co. 17 John. 525; Gowan *v.* Jeffries, 2 Ashm. 296; Williamson *v.* Wilson, 1 Bland 418; Halsey *v.* Norton, 45 Miss. 703; Wilkins *v.* Davis, 15 N. B. R. 60; McNutt *v.* King, 59 Ala. 597.

The assignee in such case is a tenant in common with the solvent partner in the joint stock. Wilkins *v.* Davis, *sup.*; Halsey *v.* Norton, *sup.*; McNutt *v.* King, *sup.*

Where, after the bankruptcy of a firm, the partners continued the same kind of business under the same partnership name, and one of them, in the name of the firm, executed a written acknowledgment of a partnership debt discharged by the bankruptcy: *Held*, that the other partner was not bound by the acknowledgment, the bankruptcy having dissolved the partnership, and thus put an end to the right of one partner to bind the other; and the business transacted since the bankruptcy being an entirely new partnership. Atwood *v.* Gillett, 2 Dougl. 206.

In an action by partners for the conversion of partnership property, a plea which avers the bankruptcy of one of them is a good and sufficient plea in bar. McNutt *v.* King, 59 Ala. 597.

The transfer by an assignee in bank-

2. *As to the lunacy of one of the partners.*—After considerable difference of opinion, it may be taken as finally settled, that the lunacy of a partner does not itself dissolve the firm ;[1] but that the confirmed lunacy of an active partner is sufficient to induce the Court to decree a dissolution,[2] not only for the purpose of protecting the lunatic (*g*), but also for the purpose of relieving his co-partners from the difficult position in which the lunacy places them (*h*). In a leading case on this subject, two persons agreed to become partners as solicitors for twelve years ; one of them became lunatic before the twelve years were out, and subsequently died. His co-partner continued to carry on the business for some time ; but he eventually sold it ; and it was held, that the legal personal representative of the lunatic was entitled to a share of the profits up to the time of the sale (*i*). In delivering judgment the Court observed : "It is clear upon principle that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity ; but it may not in the result prove to be a ground of dissolution, for the partner may recover from his malady. When a partner therefore is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution, but in that case I consider, with Lord Kenyon, that in order to *225 make it a ground of dissolution he *must obtain a decree of the Court. If he does not apply to the Court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not

2. Lunacy.

Jones v. Noy.

Lunacy.

ruptcy of one partner of a mere right of action for the conversion of personal property, does not invest the transferee with a legal title; the only effect of the transfer would be to authorize the transferee to sue in the name of the assignee, jointly with the solvent partners, and to receive the bankrupt's share of the amount recovered. McNutt v. King, *supra*.

[1] See, however, Davis v. Lane, 10 N. H. 161, per Parkes, C. J.

An inquisition of lunacy, found against a member of a partnership, *ipso facto*, dissolves the partnership. Isler v. Baker, 6 Humph. 85.

[2] See Griswold v. Waddington, 15 John. 57; Cape Sable Co.'s Case, 3 Bland, 674.

(*g*) Jones v. Lloyd, 18 Eq. 265.

(*h*) See Sayer v. Bennet, 1 Cox, 107; Wrexham v. Hudlestone, 1 Sw. 514, note; Jones v. Noy, 2 M. & K. 125; Sadler v. Lee, 6 Beav. 324; Leaf v. Coles, 1 De G. M. & G. 171; Anon. 2 K. & J. 441; and Lord Eldon's observations in Waters v. Taylor, 2 V. & B. 303.

(*i*) Jones v. Noy, 2 M. & K. 125.

prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope, there can be no dissolution."

In Rowlands *v.* Evans and Williams *v.* Rowlands (*j*) one of three partners in a mine had become lunatic, and committees of his estate had been appointed. A bill was filed by one of the same partners for a dissolution; and a cross-bill was filed by the committees of the lunatic for the appointment of a manager, on the ground that the affairs of the partnership could be carried on advantageously to all parties, notwithstanding the lunacy. There was evidence to show that this was true; but the Master of the Rolls held that the partnership must be dissolved, and that the Court could not appoint a manager to carry on the concern for the benefit of the lunatic's estate. The partnership property was ordered to be sold as a going concern, with liberty to all parties to bid, and a receiver and manager was appointed until the sale.

Rowlands *v.* Evans, and Williams *v.* Rowlands.

In order to induce the Court to decree a dissolution on the ground of the insanity of one of the partners, the Court must be satisfied by clear evidence that the insanity exists and is incurable (*k*)[1]; a temporary illness is not sufficient (*l*); and notwithstanding strong evidence as to the past, the Court requires to be convinced that the insanity exists at the time its interference is called for, and it will, therefore, if necessary, before making a decree, direct an inquiry whether the alleged lunatic is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members, *according to *226 the articles of partnership. (*m*) But no such inquiry is

Evidence of lunacy.

(*j*) 30 Beav. 302. In the same case it was held that the committees could not exercise an option which the lunatic had of buying the share of one of his co-partners. The right of pre-emption had accrued to the lunatic before his lunacy, and that event occurred before the time for exercising the option had expired.

(*k*) See Kirby *v.* Carr, 3 Y. & C. Ex. 184; Anon. 2 K. & J. 441.

[1] On the question of the mental competency of a party to make a division, with his co-partner and co-tenant, of a large personal and real estate, the degree of injustice and inequality in the division will be taken into consideration, with the proof in regard to incompetency. Doughty *v.* Doughty, 7 N. J. Eq. 227.

(*l*) See the last note, and Whitwell *v.* Arthur, 35 Beav. 140; Huddlestone's case, cited 2 Ves. Sen. 34, and Sayer *v.* Bennet, 1 Cox, 107.

(*m*) See Anon. 3 K. & J. 441; Kirby *v.* Carr, 3 Y. & C. Ex. 184, and Sayer *v.* Bennet, 1 Cox, 107, in which two last

necessary where the partner is a lunatic, and so found by inquisition. (*n*)

Lunacy

A lunatic partner not so found by inquisition is entitled to bring an action (by a next friend) for a dissolution, but it is doubtful whether the partnership can be completely wound up in the absence of a committee. (*o*)

In decreeing a dissolution of a partnership, not at will, on the ground of insanity, the Court declares the partnership dissolved as from the date of the decree, and not from a prior day. (*p*) But if the articles of partnership authorize a dissolution, and the partnership has been dissolved under the articles —which may be done notwithstanding the insanity of one of the partners (*q*)—the dissolution must date from the time at which the partnership was so dissolved, and not from the date of the decree.(*r*)

Decree.

Where a partnership is at will, and notice to dissolve has been given, the dissolution will be decreed as from the time fixed by the notice. (*s*) It was probably on the ground that a partnership at will is determinable on notice, that in Kirby *v.* Carr (*t*) the dissolution was decreed as from the filing of the bill, no previous notice having been given.

When the Court dissolves a partnership on the ground of insanity, it directs the costs to be paid out of the partnership assets. (*u*)

Costs.

By the Lunacy regulation act, 16 & 17 Vict. c. 70, § 123, it is enacted that, "where a person, being a member of a copartnership firm, becomes a lunatic, the Lord Chancellor may, by order made on the application of the partner or *227 partners of *the lunatic, or of such other person or persons as the Lord Chancellor shall think entitled to require the same, dissolve the partnership; and thereupon, or upon a dissolution of the partnership by decree of the Court of Chancery, or otherwise by due course of law, the committee of the estate, in the

Lunacy regulation act.

cases the partnership was a partnership at will.

(*n*) Milne *v.* Bartlett, 3 Jur. 358.

(*o*) Jones v. Lloyd, 18 Eq. 265.

(*p*) Besch *v.* Frolich, 1 Ph. 172. In Sander v. Sander, 2 Coll. 276, and Jones v. Welch, 1 K. & J. 765, the dissolution was also from the date of the decree, but the reports do not show whether the partnerships were at will or not.

(*q*) Robertson *v.* Lockie, 15 Sim. 285; and see Mellersh *v.* Keen, 27 Beav. 236.

(*r*) See Robertson *v.* Lockie, 15 Sim. 285; Bagshaw *v.* Parker, 10 Beav. 532.

(*s*) Mellersh *v.* Keen, 27 Beav. 236.

(*t*) 3 Y. & C. Ex. 184. See, also, Shepherd v. Allen, 35 Beav. 577.

(*u*) Jones *v.* Welch, 1 K. & J. 765.

name and on behalf of the lunatic, may join and concur with such other person or persons in disposing of the partnership property, as well real as personal, to such persons, upon such terms, and in such manner, and may and shall execute and do such conveyances and things for effectuating this present provision, and apply the moneys payable to the lunatic in respect of his share and interest in the co-partnership, in such manner as the Lord Chancellor shall order."

3. *As to misconduct and destruction of mutual confidence.*— The Court will dissolve a partnership on the ground that a partner so grossly misconducts himself as to render it impossible for his co-partners to continue to act with him. (*v*)[1] But it is not considered to be the duty of the Court to

3. Misconduct.

(*v*) See Smith *v.* Jeyes, 4 Beav. 502; Waters *v.* Taylor, 2 V. & B. 299; Charlton *v.* Poulter, 19 Ves. 148, note.

[1] Cases of gross misconduct, want of good faith, or criminal want of diligence, or such cause as is productive of serious and permanent injury to the partnership concerns, or renders it impracticable to carry on the business, is good ground for dissolution at the suit of the injured partner. Howell *v.* Harvey, 5 Ark. 270.

So, habitual drunkenness, great extravagance, or unwarrantable negligence in conducting the business of the partnership, justifies a dissolution; but it must be a strong and clear case of positive or meditated abuse to authorize such a decree. Howell *v.* Harvey, *supra.*

For minor misconduct and grievances, if they require redress, the court will interfere by injunction. Howell *v.* Harvey, *supra.*

Where the articles of partnership were, that one partner was to furnish funds for keeping up the supplies, when in his power to do so, and the other partner to attend to selling the goods, while he remained at home, it is clear that the parties never contemplated that slight neglect, or accidental failures of either to keep his engagements should operate a dissolution, but only unequivocal demonstrations of gross acts of abuse or misconduct, where the injury would be imminent and irreparable. Under such an agreement, occasional absence from the State of one partner, where the other makes no objection, or detention from home by sickness in his family, does not warrant a dissolution; nor does the fact that the partner so absent was not, generally, a very profitable or attentive partner. Howell *v.* Harvey, *sup.*

Though bad character, drunkenness and dishonesty on the part of one partner may be good grounds for dissolving a partnership, on the application of the other, this other not having known at the time of forming the partnership, these characteristics of his co-partner, yet, when before the partnership was formed they were known by the partner not guilty of them to have existed, they do not authorize such partner himself to treat the partnership as ended, and to take himself all the benefits of the joint labor and joint property. Ambler *v.* Whipple, 20 Wall. 546.

A want of courtesy to some customers of the firm, working no serious injury, is not a sufficient cause for a dissolution. Gerard *v.* Gateau, 84 Ill. 121.

Where the operations of a partnership in the business of supplying beef-

enter into partnership squabbles, and it will not dissolve a partnership on the ground of the ill-temper or misconduct of one or more of the partners[s], unless the others are in effect excluded from the concern (*x*);[s] or unless the misconduct is of such a nature as utterly

cattle to the government, under a contract with one of the firm, were suspended by an injunction issued on the filing of a bill by one member against another, but neither party treated the partnership as legally dissolved: *Held*, that it existed until the filing of the decree of dissolution. Abrahams *v.* Myers, 40 Md. 499.

Though the costs of settling a partnership business are ordinarily charged upon the partnership property, they will be charged upon one partner alone, where his conduct merits punishment. Taylor *v.* Cawthorne, 2 Dev. Eq. 221.

A court of equity, in decreeing the dissolution of a partnership, may declare at what date the contract shall be at an end; but it may be questioned whether a mere violation of the articles of partnership by the defendant, not resulting in loss or injury, would make it proper for the court to fix the date of the dissolution at an earlier day than the abandonment of the partnership by the aggrieved party; and where the only effect of a modification of the chancellor's decree, so as to make the dissolution take effect as of an earlier day, would be to deprive the defendant of the right to the compensation stipulated in the articles, and that compensation is shown to be a reasonable allowance for the services actually rendered by him, the appellate court will not disturb the decree. Dumont *v.* Ruepprecht, 38 Ala. 175.

[s] While a partnership or association will not ordinarily be dissolved for mere defects of temper in some of the members of the co-partnership, the evidence of violent and lasting dissensions, is a ground upon which a Court of Equity will decree a dissolution. In such a case, a receiver will be appointed for an adjustment of the accounts of the co-partnership or association, and a decree of dissolution will be made. Lafond *v.* Deems, 52 How. Pr. 41; Abb. N. Cas. 318.

A court of equity may dissolve a partnership when difficulties between co-partners are of so serious a nature as to render the continuance of the company impracticable and injurious to one or both of its members. Blake *v.* Dorgan, 1 G. Greene, 537.

A mere error of judgment, especially if involving no permanent mischief, is no ground for a decree dissolving a partnership. Cash *v.* Earnshaw, 66 Ill. 402.

(*x*) See Goodman *v.* Whitcomb, 1 Jac. & W. 589; Marshall *v.* Colman, 2 ib. 266; Wray *v.* Hutchinson, 2 M. & K. 235; Roberts *v.* Eberhardt, Kay, 148.

[s] See Berry *v.* Cross, 3 Sandf. Ch. 1, the exclusion of a person elected trustee in an unincorporated company: Werner *v.* Leisen, 31 Wisc. 169; the exclusion of a joint stockholder, Hartman *v.* Woehr, 18 N. J. Eq. 383.

Even where the partnership has been legally dissolved, and one partner continues to carry on the business, unlawfully using the property of the other in it, the retiring partner is at his option entitled to his share of the profits earned while his property is thus used. Hartman *v.* Woehr, *sup.*

Where one partner got possession of the entire proceeds of the year's operations without the consent of his co-partner (there being nothing in partnership agreement authorizing him so to do), and assumed the exclusive control of the whole business: *Held*, that it was such a breach of faith as to authorize a decree for a dissolution of the partnership.

to destroy the mutual confidence which must subsist between partners if they are to continue to carry on their business together. (*y*)[1] Where a dissolution is sought on this latter ground, it would seem that the misconduct must be such as to affect the business, not merely by shaking its credit in the eyes of the world, but by rendering it impossible for the partners to conduct their business together according to the agreement into which they have entered. (*z*)[2]

Kennedy *v.* Kennedy, 3 Dana, 239.

Voluntary mutual relief associations are so far partnerships that a court of equity may dissolve them if they improperly exclude a member from voting. Gorman *v.* Russell, 14 Cal. 531.

Where a voluntary association, adjudged to be a partnership, and liable to dissolution for improperly excluding a member, thus excluded a member for refusing to take an oath not required by the constitution or by-laws, but afterwards, upon suit brought by him, removed the unauthorized restriction on the exercise of his rights as a member: *Held*, that dissolution could not be decreed. Gorman *v.* Russell, 18 Cal. 688.

(*y*) See Smith *v.* Jeyes, 4 Beav. 502; Harrison *v.* Tennant, 21 Beav. 482; Liardet *v.* Adams, 1 Mont, Part 112, note where Lord Thurlow is reported to have said he did not see what degree of misconduct was to be held sufficient ground for dissolving a partnership.

[1] Where, upon a bill for dissolution, it appeared that the defendant was chargeable with misconduct in making a needless purchase of stock, by which the firm had been run heavily in debt, and in permitting a judgment to be recovered therefor without the knowledge of his partner; and also in colluding with others in a secret removal of assets of the firm for some purpose inconsistent with good faith towards the complainant, and that the complainant had been led thereby to procure the arrest of defendant on a charge of larceny: *Held*, that these circumstances warranted a dissolution on the ground that mutual confidence had been destroyed. Seighortner *v.* Weisenborn, 20 N. J. Eq. 172.

To a bill filed to revive a partnership, alleging that it was dissolved because a failure to obtain a government grant, the obtaining of which seemed probable, the defendant, in his answer, denied that this was the only reason, and gave other reasons for the dissolution: *Held*, that such denial was not irrelevant, and that the other reasons were likewise not irrelevant, unless they could be considered exceptionable as being scandalous; and an averment that the defendant "had become convinced that a business connection with the complainant was inexpedient and unsafe," could not be deemed scandalous; nor was it incompetent for the defendant to allege and prove that an offer by complainant to renew the partnership was merely colorable. Griswold *v.* Hill, 1 Paine, 390.

(*z*) See Anon. 2 K. & J. 441, where a partner had attempted suicide.

[2] Upon a bill in equity, for a dissolution and settlement of a partnership, such dissolution will be decreed where it appears that the defendants refuse to carry out the terms of the partnership articles, and insist on changing or disregarding the stipulations thereof; that the state of feeling between the parties justifies the apprehension that the joint business can be no longer prosecuted to the mutual advantage of all the partners; and that a dissolution would not

*228 *Most of the cases on this subject have come before the Court on a motion for an injunction to restrain a partner from acting improperly, and they will be alluded to hereafter when the remedy by injunction is considered. It may, however, be usefully observed here that keeping erroneous accounts and not entering receipts (*a*),[1] refusal to meet on matters of business (*b*),[2] continued quarreling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation (*c*), have been held sufficient to justify a dissolution. It is not, however, necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each had a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it. A strong illustration of this is afforded by Harrison *v.* Tennant. (*d*) In that case three persons, A., B. and C., entered into partnership as solicitors for twenty-one years. A. and B. had been in practice as partners before the partnership of A., B. and C. commenced, and were sued in Chancery in respect of matters which had arisen in the course of such practice. In this suit A. was charged, after the formation of the firm A., B. and C., with gross misconduct and with fraud. B. and C. wished to have A.'s

Degree of misconduct.

Harrison v. Tennant.

probably inflict any material injury on either party, although there may be no such acts of misconduct, or willful violation of the terms of the contract by the defendants, as would authorize a dissolution for that cause. Meaher *v.* Cox, 1 Ala. Sel. Cas. 156; S. C. 37 Ala. 201.

Where a partnership is formed for the purpose of buying and selling lands, each partner to furnish an equal share of money, if one should refuse to make the necessary advances, it would be good cause for putting an end to the partnership; but as long as the partnership subsists, a larger advance by one partner than it was his duty to make will be compensated by allowing him interest on such excess. Turnipseed *v.* Goodwin, 9 Ala. 372.

(*a*) Cheeseman *v.* Price, 35 Beav. 142.

[1] A partner defrauded of his rightful portion of the partnership receipts by the false entries, etc., of his co-partner, is entitled to a dissolution and accounting, no matter if the term has not expired. Cottle *v.* Leitch, 35 Cal. 434.

(*b*) De Berenger *v.* Hamel, 7 Jar. Byth. 25, ed. 2.

[2] The absconding of a partner does not, *per se*, dissolve the partnership. Arnold *v.* Brown, 24 Pick. 89. *Contra*, Whitman *v.* Leonard, 3 Id. 177, 179.

(*c*) Baxter *v.* West, 1 Dr. & Sm. 173; Watney *v.* Wells, 30 Beav. 56; Pease *v.* Hewitt, 31 Beav. 22; Leary *v.* Shout, 33 Beav. 582.

(*d*) 21 Beav. 482.

answer settled in consultation, but A. declined, made himself the sole solicitor on the record instead of the firm, and put in his answer without further consulting his co-partners. B. and C. filed a bill against A. for a dissolution, and sent circulars to their clients stating that they had taken steps to dissolve the partnership existing between themselves and A., in consequence of the grave charges made against him in the suit above referred to. A. resisted the application for a dissolution on the ground that he had not been guilty of any misconduct towards his co-partners in the *business of the firm, nor of any breach of the articles of partnership. But a dissolution was decreed upon the broad principle that the mutual confidence reposed by all three partners in each other when the partnership was formed, had not unreasonably ceased; that it was impossible that the business could be conducted as originally contemplated; and that although, being gentlemen, no outbreak had occurred between them, yet an attempt to compel them to act as partners for the future would, as against them all, be to compel them to inflict irreparable injury upon each other. Again in Essell *v.* Hayward (*e*), it was held, that where one partner had become liable to a criminal prosecution by reason of his having been guilty of a fraudulent breach of trust, his co-partner had a right to have the partnership dissolved; and a notice to dissolve having been given by him the partnership was ordered to stand dissolved as from the date of the notice, although the partnership was not at will.

*229

Essell *v.* Hayward.

It must be borne in mind that the Court will never permit a partner, by misconducting himself and rendering it impossible for his partners to act in harmony with him to obtain a dissolution on the ground of the impossibility so created by himself. (*f*)[1]

Misconduct on part of partner seeking dissolution.

In order to facilitate a dissolution in the event of misconduct, a special clause is usually inserted in partnership articles. The effect of clauses of this description will be adverted to hereafter. (*g*)

(*e*) 30 Beav. 158.

(*f*) See Harrison *v.* Tennant, 21 Beav. 493, 494; Fairthorne *v.* Weston, 3 Ha. 387.

[1] Gerard *v.* Gateau, 84 Ill. 121.

(*g*) Anderson *v.* Anderson, 25 Beav. 190, would seem at first sight to throw some doubt on the efficacy of such clauses, where the misconduct complained of is not really of any importance. But the observations there made must be taken with reference to the facts before the Court.

3. *Transfer of Interest.*

Transfer of interest.

In addition to the causes of dissolution already mentioned, there are certain events which, where the contrary is not expressly provided by agreement between the partners, immediately put an end to the partnership, although none of the partners may have expressed any desire for a dissolution. *230 *Whether the partnership is of definite or indefinite duration is unimportant (*h*); for the principle upon which a dissolution results from the events in question, is, that if no dissolution were to follow, new partners would be introduced without the consent of all of the existing members of the firm. (*i*) Any event which would produce this effect causes a dissolution *of the whole firm* (*k*). Upon this principle it is that, in the absence of an express agreement to the contrary, a partnership is dissolved by taking a partner's share in execution under a *fi. fa.* (*l*),[1] by the transfer of his share by bankruptcy (*m*), or outlawry (*n*), and in the case of a female partner, by her marriage. (*o*)

Assignment of share.

The question whether an assignment by a member of an ordinary firm, of his share in it, dissolves it, or gives the other members a right to have it dissolved, has not been much considered in this country. (*p*)[2] Where the partnership is

(*h*) Crawford *v.* Hamilton, 3 Mad. 251.

(*i*) See Crawshay *v.* Maule, 1 Swanst. 509.

(*k*) Collyer on Part. 72.

(*l*) Skipp *v.* Harwood, 2 Swanst. 586; Johnson *v.* Evans, 7 Man. & Gr. 240; Habershon *v.* Blurton, 1 De G. & Sm. 121; Aspinall *v.* The London and Northwest. Rail. Co. 11 Ha. 325.

[1] See Renton *v.* Chaplain, 9 N. J. Eq. 62; *post*, 691.

(*m*) Fox *v.* Hanbury, 2 Cowp. 448; *Ex parte* Williams, 11 Ves. 5; *Ex parte* Smith, 5 Ves. 297.

(*n*) As to attainder and outlawry, see *ante*, p. 80. If a partner's share vests in the Crown, it is said that the Crown, by its prerogative, becomes entitled to all the partnership property; Coll. on Part. 72, *sed quære.*

(*o*) Nerot *v.* Burnard, 4 Russ. 247, affd. 2 Bli. N. S. 215.

(*p*) In Heath *v.* Sampson, 4 B. & Ad. 175, the assignment was by one partner to his co-partner; and in Jefferys *v.* Smith, 3 Russ. 158, the shares were transferable by the articles of partnership.

[2] See *post*, 698.

An assignment by one partner, of all his interest in the partnership property to a stranger, necessarily operates a dissolution of the partnership. Monroe *v.* Hamilton, 60 Ala. 226; Saloy *v.* Albrecht, 17 La. Ann. 75; Carroll *v.* Evans, 27 Tex. 262; Miller *v.* Brigham, 50 Cal. 615.

An assignment of partnership property for the benefit of creditors, which is void for want of conformity with statute requirements, will not work a

at will, an assignment and notice thereof must, it is conceived, operate as a dissolution. But where the partnership is for a definite period, which is not expired, there is more difficulty in arriving at a correct conclusion. To hold that the assignment operates as a dissolution, renders it competent for a partner to do indirectly what he cannot do directly, viz., dissolve before the expiration of the time for which the partnership was entered into. On the other hand, to hold that the partnership continues, is not just to the as-

dissolution of the partnership. Simmons *v.* Curtis, 41 Me. 373.

Taking an account of stock, and transferring the amount due to one partner to another firm of which he is a member, does not of itself dissolve the partnership. Russell *v.* Leland, 12 Allen, 349.

Evidence that a partner sold to a stranger his interest in the stock of goods belonging to the firm, but not in the notes, accounts, and other assets of the firm, and that the purchaser formed a partnership with the seller's partners, is not sufficient proof of the dissolution of the original partnership. Cody *v.* Cody, 31 Ga. 619.

It is held by a number of cases that an assignment, by one partner, of all his interest in the partnership, is *ipso facto* a dissolution of the partnership, though the assignment is made to another partner. Marquand v. New York Manuf. Co. 17 Johns. 525; Edens *v.* Williams, 36 Ill. 252; Horton's appeal, 13 Pa. St. 67; Cochran *v.* Perry, 8 Watts & S. 262; Rogers *v.* Nichols, 20 Tex. 719; Cochran *v.* Albert, 5 Watts & S. 333. See, however, Taft *v.* Buffum, 14 Pick. 322.

But when such assignment is made to his co-partner, it has been held that it does not have that effect, unless its terms show that the parties contemplated and intended his entire withdrawal from the partnership, and the termination of his duties, liabilities and authority as a partner between themselves. Monroe *v.* Hamilton, *sup.*

Where one of two or more partners undertakes, by an incomplete and executory contract, to transfer his interest in the firm to the others, such contract does not work a dissolution of the partnership until executed; and notice given to customers that such partnership is dissolved, based on the authority of such executory contract, will not release such withdrawing partner from his liability for debts of the firm contracted after the making of such contract and before notice of the actual dissolution. Pennock *v.* White, 10 N. Y. Wkly. Dig. 74.

An assignment by one of two partners to the other of all his interest in the firm property, to be applied to the payment of the firm debts, does not dissolve the firm; and the property remains partnership property till the partnership debts are paid. Matter of Shepard, 3 Ben. 347.

A two years lease at a stated rental by one partner to another of his interest in coal mines operated by the firm, has been held either to dissolve the partnership absolutely, or, with the assent of the members, to suspend it during the continuance of the lease. McAdams *v.* Hawes, 9 Bush, 15.

A mortgage by one partner of all his interest in the firm property, or by the firm of all the property, does not *per se* work a dissolution of the firm. State v. Quick, 10 Iowa, 451.

Where two persons are cultivating a crop as equal partners, and one executes to the other a mortgage on his entire interest, as security for an individual debt which the mortgagee has become

signor's co-partners. The assignment does not of itself create a partnership between them and the assignee (*q*); but it does *231 deprive the assignor of all his *interest in the concern, and his co-partners may fairly urge that they never contemplated a partnership with a person having no interest in it. It seems impossible therefore to deny their right to make the assignment a ground for dissolution. The right of the assignee, alone or with the assignor, to insist on a dissolution, against the will of the assignor's co-partners, is much more doubtful, and has not been decided. In America such right is held to exist (*r*); but in that country it seems that contracts of partnership for a definite period

liable to pay; and the mortgage contains a stipulation that, since the crop will be gathered before the maturity of the debt, the mortgagee shall take possession of it, and dispose of it for the mutual benefit of the parties; and that the net profits, after settlement of the partnership dealings, shall be divided into two equal parts, one of which shall belong to the mortgagee absolutely, and the other shall be held by him in trust for the mortgagor, to be applied to the payment of the secured debt, and the balance paid over to the mortgagor; such mortgage does not operate a dissolution of the partnership, nor affect the duties and liabilities of the mortgagor as a partner; nor does it limit his authority as a partner to contract debts in carrying on the business, and to pay debts so contracted; it only confers on the mortgagee the right to the exclusive possession of the crop, and the exclusive power to dispose of it, and creates a lien on the mortgagor's interest in it as security for the mortgage debt. Monroe *v.* Hamilton, 60 Ala. 226.

By the conditions of an agreement, a member transferred his interest in a firm as a collateral security for the payment of a debt; but the transfer contemplated a continuance of his interest and authority in the firm: *Held*, that the instrument was merely a mortgage, and did not effect a dissolution of the partnership; that he could agree to a dissolution and to an appraisement and inventory to ascertain his final interest; that his co-partners might take the stock at the value so ascertained, they being liable as trustees for the proceeds, and responsible for any fraud or unfairness in the arrangement, as in an ordinary sale for payment of debts. Du Pont *v.* McLaran, 61 Mo. 502.

The resgistration of a conveyance operates as constructive notice only when the statute authorizes its registration, and only to the extent of those provisions which are within the registration statutes. Hence, the registration of a mortgage, by which one partner conveys to his co-partner his entire interest in the partnership property as security for a debt, while it would operate as constructive notice, as against subsequent creditors and purchasers of the lien created on the mortgagor's interest in the property, would not have that effect so far as it imposed any restraint or limitation on the authority of the mortgagor as a partner. Monroe *v.* Hamilton, 60 Ala. 226.

(*q*) See Jefferys *v.* Smith, 3 Russ. 158.

(*r*) Story on Part. § 308; 3 Kent. Com. 59; Marquand *v.* New York Manufac. Co. 17 Johns, 525.

are almost as easily dissolved as partnerships at will, which is certainly not the case here. (*s*)

Whether an agreement by an ordinary partner to hold his share in the partnership in trust for other persons entitles his co-partners to dissolve the partnership has never been determined. Considering, however, the effect of notice to them of the existence of the trust, they would probably be held entitled to have the partnership dissolved in order to be relieved from their embarrassment. The *cestui que trust* clearly does not become a partner with the partners of his trustee. (*t*)

Creation of trust of share.

4. *Death.*

The death of any partner immediately (*u*) dissolves the partnership; and dissolves it not only as regards the deceased, but also, unless there is some agreement to the contrary, as regards all the other partners.[1] This is obviously reasonable, for by the death of

(*s*) In Glyn *v.* Hood, 1 Giff. 328, and 1 De G. F. & J. 334; Pinkett v. Wright, 2 Ha. 120; Murray v. Pinkett, 12 Cl. & Fin. 764; and Jefferys *v.* Smith, 3 Russ. 158, some observations on the rights of an assignee of a share will be found, but they do not touch the question alluded to in the text.

(*t*) See Jefferys v. Smith, 3 Russ. 158; Newry Rail. Co. v. Moss, 14 Beav. 64; Bugg's case, 2 Dr. & Sm. 452. Goddard *v.* Hodges, 1 Cr. & M. 33, is the other way; but as to this, see *ante*, p. 36, note (*i*).

(*u*) See Bell *v.* Nevin, 1 W. N. 331, where a notice to dissolve had been given, but was rendered inoperative by a death.

[1] Unless the partnership articles specially provide for its continuance, the death or retirement of a member of a firm, or the introduction of a new member, operates as a dissolution of the partnership. Bank of Mobile *v.* Andrews, 2 Sneed, 535; Mudd *v.* Bast, 34 Mo. 465; Potter *v.* Moses, 1 R. I. 430; Filley *v.* Phelps, 18 Conn. 294; Spannhorst *v.* Link, 46 Mo.; Burwell v. Mandeville, 2 How. 560; Marlett *v.* Jackman, 3 Allen, 287; Scholefield *v.* Eichelberger, 7 Pet. 586; Knapp *v.* McBride, 7 Ala. 19; Goodburn *v.* Stevens, 5 Gill. 1; Williamson *v.* Wilson, 1 Bland, 418; Gratz *v.* Bayard, 11 Serg. & R. 41; Davis *v.* Christian, 15 Gratt. 11; Roberts *v.* Kelsey, 38 Mich. 602; Jenness *v.* Carleton, 40 Mich. 343; Remick *v.* Ewing, 42 Ill. 342; Forrester *v.* Oliver, 1 Bradwell, 259. See *ante*, p. 86, note. See, also, Carroll *v.* Alston, 1 S. C. 7.

A power previously given to such firm would terminate on the happening of either event. See the cases above cited, and Ewell's Evans on Agency, p. *32, and note.

Authority to a firm to receive goods is not extended to a new firm, formed after dissolution of the original one from a part of the members thereof. Angle *v.* Mississippi, etc. R. R. Co. 9 Iowa, 487.

So the death of a special partner dissolves the partnership. Ames *v.* Downing, 1 Bradf. 321; Jacquin *v.* Buisson, 11 How. Pr. 385.

After the death of J., one of three

one of the members it is no longer possible to adhere to the original contract, the essence of which is (in the case supposed), that all the parties to it shall be alive. It has long been settled *232 that the representatives of the deceased have *no right to succeed him in the firm unless there is a clear agreement to that effect. (x)

equal partners in the business of a flouring mill, his two survivors, without either the assent or dissent of his administrator, erected a granary which a successful continuation of the business required, and carried on the business nearly a year, under an arrangement with the administrator, without rendering any account. On a bill by the administrator for a discovery and account: *Held*, that the partnership being dissolved by J.'s death, his survivors had no lawful right thereafter to expend any of its funds in the conduct of the business, however necessary. Remick *v.* Emig, 42 Ill. 342.

A lease for a term of years made by one of two partners to the firm, for the purposes of the business, is subject to the continuance of the business, and upon a dissolution, by the death of either partner, the lease terminates. Johnson *v.* Hartshorne, 52 N. Y. 173.

A surviving partner cannot be held responsible on a contract made without his assent or knowledge by another partner, after the firm has been dissolved by the death of one of its members, although no notice of its dissolution has been given to the person with whom the contract was made. Marlett *v.* Jackman, 3 Allen, 287.

Where, after the death of one member of a firm, the holder of a note of the firm, without knowledge of the death, received a new note signed in the firm name in renewal of such note, and delivered up the same: *Held*, that the new note, having been taken through a mistake of fact, was not a payment of the old note. Also, *held*, that the bringing of an action upon the last note against the surviving partner, and recovery of judgment thereon in the absence of proof of knowledge on the part of plaintiff at the time of bringing the action, that the deceased partner died before the giving of the note was not a ratification of the transaction as a release of the estate of the deceased. First Nat'l Bank *v.* Morgan, 73 N.Y. 593.

But a partner may, by his will, provide that the partnership shall continue, nothwithstanding his death, and if it be assented to by the surviving partner, it becomes obligatory. Burwell *v.* Mandeville, 2 How. 560.

Although by the general rule of law, every partnership is dissolved by the death of one partner, yet partners may, by agreement, provide for the continuance of the partnership after the death of one of the partners; and in this agreement each partner may bind his whole estates for debts incurred by the continued partnership after his death, or he may bind only that portion of the property which may be embarked in the partnership at the time of his death. Cook *v.* Rogers, 8 Am. Law Record, 641.

Under a special contract to that effect, a commercial partnership will continue after the death of one of the partners, for the purpose of administration and liquidation, if not for all purposes. Powell *v.* Hopson, 13 La. Ann. 626.

(x) Pearce *v.* Chamberlain, 2 Ves. Sen. 33; Crawford *v.* Hamilton, 3 Madd. 251; Crawshay *v.* Maule, 1 Swanst. 509; Vulliamy *v.* Noble, 3 Mer. 614; Gillespie *v.* Hamilton, 3 Madd. 251; Crosbie *v.* Guion, 23 Beav. 518.

5. *The occurrence of some event which renders the continuance of the partnership illegal.*

Upon principle, it is apprehended that if, by anychange in the law, it becomes illegal to carry on a business, every partnership formed before the making the law for the purpose of carrying on that business, must be taken to have been dissolved by the law in question. So if, the law remaining unchanged, some event happens which renders it illegal for the mem- Illegality.

See, also, Walker *v.* Wait, 50 Vt. 668.

A court of equity may authorize the continuance of a partnership after the death of a partner, on behalf of infants. Powell *v.* North, 3 Ind. 392.

Several persons who were tenants in common of certain quarry lands, formed a co-partnership in 1850 to carry on the quarrying business, the several partners putting in their interests in the quarry lands, and having a corresponding interest in the co-partnership. One of the interests thus put in was owned by M., a widow, for life, and subject to her life estate, by P., her daughter, and the interest in the co-partnership was owned by them in the same manner. By the partnership agreement, the co-partnership was to continue so long as a majority in interest should desire. The business was continued, by assent of all parties, through several changes by death and succession, until 1872, when M. died, giving by will all her interest, which was mainly her share of the undivided profits, to her grandchildren, who, with her administrator, were the petitioners. These profits had been very large, but instead of being divided, had been invested in other quarry lands, which had been in part worked. After 1872, the business was still carried on as before, under the management of B., who had been the principal manager from the first. In 1874, the petitioners, having previously demanded of B. an account and payment of the money due them from the co-partnership, brought a bill in equity praying that all the property bought with the profits of the business previous to the death of M. might be sold and their share of the money paid over to them; that an account be taken of all the co-partnership dealings, and that a receiver be appointed. The petition averred that the petitioners, by reason of the deaths of members of the co-partnership, and the confusion of interests, were unable to say whether the co-partnership was dissolved, but that they believed, and therefore averred, that it was dissolved. B., as manager of the business, had incurred large personal obligations, and a large amount of property taken by him for debts due the co-partnership, had greatly depreciated: *Held*, 1. That the co-partnership was to be regarded as continuing by consent of the parties succeeding to the interests of the members who had died, and is still existing. 2. That the allegation that the petitioners were unable to say whether there had been a dissolution or not, but that they believed, and therefore averred that the co-partnership was dissolved, was not an averment that the co-partnership had been dissolved by a withdrawal of the assent under which it had been continued, and a demand for its dissolution. 3. That the demand by the petitioners of an account from B., and of payment of their share of the

bers of a firm to continue to carry on their business in partnership, such event dissolves the firm. For example, if a partnership exists between two persons residing and carrying on trade in different countries, and war between those countries is proclaimed, a stop is thereby put to further intercourse between the partners, and the partnership subsisting between them is consequently dissolved. (*y*)[1]

War.

profits, did not constitute a demand for a dissolution. That the petitioners were not entitled to demand, in cash, the value of their interest, inasmuch as they had consented to let the business go on under the management of B., and having taken their chance for profits from the use of their share by the co-partnership, they were to share the risks of loss from the continuance of the business. 5. That the petitioners could effect a dissolution of the co-partnership by giving distinct notice to B. that they should not longer consent to its continuance, and should hold him responsible as a surviving partner, for the further use of their share of the co-partnership property. Duffield *v.* Brainard, 45 Conn. 424.

Where, after the death of a partner, one of his survivors has taken no part with the rest in carrying on partnership business, he is not bound by any implication that they constitute a new firm. Matteson *v.* Nathanson, 38 Mich. 377.

It is well established, that in mining partnerships there is usually no *delectus personæ*, and, as a consequence, that such a partnership is not dissolved by the death of a partner, or a sale of an interest by a partner to a stranger. Taylor *v.* Castle, 42 Cal. 367.

Whether a member's death operates as a dissolution of a partnership or unincorporated joint-stock company depends on the terms and effect of the contract of formation, and the character of the organization. Walker *v.* Wait, 50 Vt. 668.

(*y*) Story on Part. § 315 *et seq.* and Grimwold *v.* Waddington, 16 Johns. 438 (Amer.) there cited.

[1] A partnership between persons residing in two different countries, for commercial purposes, is suspended, if not *ipso facto* determined by the breaking out of war between those countries. Griswold *v.* Waddington, 15 Johns. 57; 16 Id. 438; Seaman *v.* Waddington, Id. 510. See *post*, p. 232.

Belligerent relations between partners during the late civil war not only operated to dissolve or suspend partnerships then existing, but made unlawful the formation of new partnerships while such relations existed. McAdams *v.* Hawes, 9 Bush, 15.

The war of the rebellion dissolved a co-partnership existing between infants in Illinois, and a person in Mississippi; but the dissolution had no regard to things past. The parties continued partners as to property actually acquired, and remained bound to account to each other therefor. Douglas' Case, 14 Ct. Cl. Rep. 1.

Where partners, domiciled on loyal and disloyal territory, were engaged in growing cotton before the war, it was not contrary to the principle of international law forbidding commercial intercourse, for the resident partner to turn over to a common agent on the spot, appointed prior to hostilities, a mass of cotton as the share of the absent partner. Douglas' Case, *sup.*

A payment, in discharge of an actual indebtedness made by one partner to his partners—absent on hostile territory,

SECTION III.—ON THE APPLICATION OF THE FOREGOING DOCTRINES TO COMPANIES.

The law relating to the dissolution and winding up of companies is principally statutory and of modern creation, and will be examined hereafter. In the present place it is proposed to make a few general observations only, for the purpose of showing the extent to which the doctrines alluded to in the last section are on principle applicable to companies. Dissolution of companies.

The reasons for which an ordinary partnership is held to be dissolved by the death, lunacy, or bankruptcy of any one of its members, or by a transfer of his interest, or by his determination to retire, have no application to companies the shares in *which are transferable, and the management of the concerns *233 of which is entrusted by all the shareholders to directors. Nor is there any authority to the effect that companies with transferable shares are or can be dissolved by, or on the happening of, those events which are sufficient to dissolve, or induce the Court to dissolve, an ordinary partnership. The death, bankruptcy, or retirement of a shareholder dissolves his connection with the company (*z*), but does not dissolve the bond by which the remaining shareholders are held to each other. (*a*) The death, bankruptcy, or retirement of a partner, on the other hand, not only dissolves the firm as to him, but dissolves it as to all the other members likewise; and if the remaining partners continue in partnership together, they form a new firm, and not, in legal contemplation, the old firm less one partner.

Some of the reasons which are sufficient to induce the Court to

after the dissolution of the concern by war—whether effected by the delivery of a sum of money or of goods, will be upheld, if made by an agent on the spot, whose agency was created before the war began. If the money or goods thus delivered were inadequate to discharge the just claims of the absent partners, it rests with them alone to complain. Douglas' Case, *sup.*

Though the war worked a dissolution of the partnership, nevertheless, after the war, the surviving partners might maintain an action in their own names for the proceeds of captured property of which the firm were owners. Douglas' Case, *sup.*

See *ante*, p. 181.

(*z*) See Jefferys *v.* Smith, 3 Russ. 158; Greenshield's case, 5 De G. & S. 599.

(*a*) See Thomas *v.* Wells, 16 C. B. N. S. 508, where, however, the marginal note is scarcely warranted by the judgment.

dissolve a partnership are, however, quite as applicable to companies as to ordinary firms, *e. g.*, the impossibility of going on as contemplated. (*b*)

Effect of transfer of shares when company is not incorporated.

But notwithstanding the often repeated assertion, that at common law unincorporated companies with transferable shares are mere partnerships, it ought not to be inferred that what is sufficient to dissolve a partnership will also dissolve such a company. There is a great, and with reference to the present question, a very material, difference between the contract entered into between the members of an ordinary partnership and the contract entered into between the shareholders of an unincorporated company with transferable shares. In considering what is and what is not sufficient to operate as, or to justify a decree for, a dissolution, regard must be had to the contract into which the partners or shareholders have entered. In the case of an ordinary partnership the contract of the members requires that the partnership shall cease on the happening of certain events, and it *234 is to give effect to that *contract that the doctrines adverted to in the foregoing section have been established. But the contract entered into by the members of a company with transferable shares, not only does not require that the company should determine on the happening of the same events, but (as to many of them) quite the contrary; and to apply ordinary partnership doctrines to such a case would be to destroy and not to uphold the agreement into which the members have entered. At the same time it has been very generally assumed that an unincorporated company with transferable shares may, like an ordinary partnership, be dissolved at the will of any member, if no time is fixed for its duration; and, although the point does not appear to have been ever actually decided, Lord Eldon, in Van Sandau *v.* Moore (*c*), and the late Vice-Chancellor of England, in Wheeler *v.* Van Wart, (*d*) evidently thought that, under ordinary circumstances, unincorporated joint-stock companies might be dissolved by any shareholder on his giving notice to all the other shareholders. Until, however, this view shall have been judicially acted upon, it may be considered as open to question, and, for the reasons given above,

(*b*) Electric Telegraph Co. of Ireland, 22 Beav. 471.

(*c*) 1 Russ. 463.

(*d*) 2 Jur. 292, and 9 Sim. 193. See, too, Miles *v.* Thomas, 9 Sim. 606.

the writer ventures to submit that, on principle, it cannot be sustained.

Whatever doubt there may be as to unincorporated companies, there can be none with respect to companies incorporated by the Crown or by act of Parliament. A corporation cannot, by common law, be dissolved by the will of all its members; for a charter cannot be got rid of without the assent of the Crown, nor can an act of Parliament be got rid of without the assent of the Legislature. What cannot be done by all the members of a body corporate is, *à fortiori*, incapable of being done by less than all, and it consequently follows that, as regards the power of an individual member to insist on a dissolution, there is no analogy at common law between partnerships and incorporated companies. Moreover, as a corporation is distinct from the persons composing it, events which affect those persons individually, *e. g.*, lunacy, death, or bankruptcy, do not affect the existence of the body corporate; and here again, therefore, there is no analogy at common *law between partnerships and companies which are incorporated. (*e*) *235

Effect where the company is incorporated.

Adverting, therefore, solely to the general principles applicable to partnerships and corporations, it is submitted:—

Causes of the dissolution of companies.

1. That a company which is not incorporated at all, but the shares in which are transferable, is not dissolved by the death or bankruptcy of a shareholder (except as to him), and ought not to be dissolved by the Court, simply because a shareholder desires a dissolution.

2. That such a company may be dissolved, not only in the manner and under the circumstances provided for in its deed of settlement (*f*), but also (by the Court) whenever it can be shown that the business of the company cannot be carried on as intended.

3. That a company which is incorporated by charter may be dissolved by a formal surrender or cancellation of its charter, and in such other way, if any, as is pointed out therein.

4. That a company which is incorporated by act of Parliament can be dissolved only as therein provided, or by another act of Parliament.

But as will be seen in the Fourth Book, several acts of Parlia-

(*e*) As to the dissolution of corporations, see Grant on Corporations, p. 295, *et seq.*

(*f*) See Lyon *v.* Haynes, 5 Man. & Gr. 405.

ment have been passed expressly for the purpose of providing for the dissolution and winding up of companies, whether unincorporated or incorporated, and whether incorporated by charter, special act of Parliament, or registration. These acts do not prevent the Court from dissolving unincorporated companies in the exercise of its general jurisdiction (*g*); but they greatly extend its power, especially as regards incorporated companies; and, practically, the law relating to the dissolution and winding up of companies may be said to depend almost entirely on the acts in question. (*h*)

(*g*) Jones *v.* Charlemont, 16 Sim. 271; Clements *v.* Bowes, 17 ib. 167.

(*h*) See *infra*, book 4, c. 2. *et seq.*

*BOOK II. *236

OF THE RIGHTS AND OBLIGATIONS OF PARTNERSHIPS AND COMPANIES AS REGARDS NON-MEMBERS.

CHAPTER I.

OF THE LIABILITIES OF PARTNERS AND COMPANIES FOR THE ACTS OF THEIR AGENTS.

SECTION I.—GENERAL PRINCIPLES OF AGENCY AS APPLIED TO ORDINARY PARTNERSHIPS.

Each partner the agent of the firm.

EVERY member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way; and the firm is responsible for whatever is done by any of the partners when acting for the firm within the limits of the authority conferred by the nature of the business it carries on. (*a*)[1] Whatever, as between the partners themselves, may be the

(*a*) The case is different with mere part-ownerships, Barton *v.* Williams, 5 B. & A. 395; Helme *v.* Smith, 7 Bing. 709.

[1] See London, etc. Society *v.* Hagerstown, etc. Bank, 36 Penn. St. 498; Norton *v.* Thacher, 8 Neb. 186; Davis *v.* Richardson, 45 Miss. 499; Capelle *v.* Hall, 12 N. B. R. 1; Boardman *v.* Adams, 5 Iowa, 224; Abraham *v.* Hall, 59 Ala. 386; Davis *v.* Black, 5 Bradw. Ill. 32.

As to partnerships between attorneys, see *ante*, p. 216, note.

Although every member of a firm is in a sense a general agent of the firm, a firm is not necessarily the agent, general or special, of any other firm in which either of its members is a partner. Wright *v.* Ames, 4 Abb. App. Dec. 644.

Where the same person is a member of two firms, his acts, done in the name of one of the firms, cannot be proved in an action against the other firm, the same persons not comprising both firms. Kratzer *v.* Lyon, 5 Pa. St. 274.

It is proper to show the general business of a firm as bearing upon the question whether certain acts of one partner bind them. Saltmarsh *v.* Bower, 34 Ala. 613.

The authority of partners to bind each other is not fixed by the articles of copartnership, but by the character of

limits set to each other's authority, every person not acquainted with those limits is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people. (*b*) But no person is entitled to assume that any

their dealings, and the manner in which they hold themselves out to the world. Catlin *v.* Gilders, 3 Ala. 536.

Where one allowed his partner to bring an action in his own name on a demand due the partnership: *Held*, that he could not impeach the title of another, who had, in good faith and without notice, purchased the judgment recovered from the former, who was plaintiff on the record. McCotter *v.* McCotter, 16 Abb. Pr. 265; S. C. 25 How. Pr. 478.

Where one deals with a partner in a matter not within the scope of the firm business, the law presumes that he deals with him in his individual capacity. Davis *v.* Blackwell, 5 Brad. (Ill.) 32.

One member of a co-partnership cannot be made liable for the act or undertaking of another, in a transaction not embraced in their original partnership business, unless proof is adduced that he knew of the transaction and assented to it, or subseqently ratified it. Goodman *v.* White, 25 Miss. 163; Hotchin *v.* Kent, 8 Mich. 526; Cayton *v.* Hardy, 27 Mo. 536; Welles *v.* March, 30 N. Y. 344; Bell *v.* Faber, 1 Grant's Cas. 31; Nichols *v.* Hughes, 2 Bailey, 109; Scott *v.* Bandy, 2 Head (Tenn.), 197; Venable *v.* Levick, Id. 351; Long *v.* Carter, 3 Ired. L. 238; Butler *v.* Finck, 10 N.Y. Wkly. Dig. 163; Davis *v.* Blackwell, 5 Bradw. Ill. 32.

Although the engagement of an individual member of a firm may not be within the scope of the partnership dealings, yet if the transaction comes within the knowledge of his co-partners, and if assented to by them, then it will be obligatory upon the concern. McNeil *v.* Reynolds, 9 Ala. 313.

To remain silent after discovering that one partner has used the firm name for purposes outside the firm business, is evidence of assent, prior or subsequent, but not conclusive as matter of law. Ferguson *v.* Gordon, 1 Sneed, 254.

Where the acquiescence of one of two partners in the articles of an association is but an inference from his attendance at meetings, and otherwise participating in promoting its objects, the consent of the other partner cannot be inferred therefrom. Wells *v.* Turner, 16 Md. 133.

Plaintiffs were dealing in cattle as commission merchants. One member of the firm, without the knowledge of his partners, made a contract with defendant in the name of the firm, by which the firm was to advance money, the defendant purchase and ship cattle to plaintiffs, to be sold by them without commission, and the profits divided. Under that contract defendant bought and shipped cattle. The transactions resulted in loss. No settlement was had between the defendant and the firm, or the contracting member thereof, upon the basis of the contract or otherwise: *Held*, that the firm could not, ignoring the express contract, maintain an action against the defendant as an ordinary shipper upon an implied contract to pay commissions. Frye *v.* Sanders, 21 Kan. 26.

(*b*) The fact that one partner ordinarily attends to one branch of the business does not prevent his binding the firm when acting out of his own department, Morans *v.* Armstrong, Arm. M'Artn. & Ogle, Ir. N. P. Rep. 25.

partner has a more extensive authority than that above described.

The consequences of this principle are:—

1. That if an act is done by one partner on behalf of the *firm,[1] and it was necessary for carrying on the partnership business in the ordinary way, the firm will *primâ facie* be liable, although in point of fact the act was not authorized by the other partners. *237 General rules.

In the absence of any special agreement therefor, neither partner can make a contract beyond the commercial custom of the business of the firm, without the consent of the other. Chandler *v.* Sherman, 16 Fla. 99.

A written contract of partnership, in an adventure limited to certain specified transactions and to some definite duration, does not give to the partners such power to bind the firm as is possessed in cases of permanent and general mercantile transactions. Toof *v.* Duncan, 45 Miss. 48.

In order to establish that a commercial partnership is not bound by the act of one of the partners, in any particular matter, it is necessary expressly to deny his authority and to disclose by evidence the nature of their commercial business. Vienne *v.* Harris, 14 La. Ann. 382.

One who seeks to hold a non-commercial partnership, such as a mining firm, liable upon a contract made by one member only in behalf of the firm, must show affirmatively that such partner had power to contract for his associates. Such power is implied by law in the case of commercial partnerships only; with respect to non-commercial firms, it is a question of fact depending on the articles, course of business, and other circumstances shown in each case. Judge *v.* Braswell, 13 Bush, 67.

Every partner possesses fully an absolute authority to bind all the partners by his acts or contracts in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from them; and, as between the firm and third parties who deal with it in good faith and without notice, it is a matter of no consequence whether the partner is acting fairly with his co-partners in the transaction or not, if he is acting within the apparent scope of his authority, and professedly for the firm. Pahlman *v.* Taylor, 75 Ill. 629.

Any restrictions imposed by the partnership articles operate only *inter se*, and not in transactions with third persons, unless they have knowledge of such restrictions. Davis *v.* Richardson, 45 Miss. 499.

One partner cannot bind his co-partner by any contract not connected with the trade or business; and a knowledge of third persons, of the limited nature of the partnership, will be inferred from circumstances. Livingston *v.* Roosevelt, 4 Johns. 251.

Where the credit of the firm is used by a partner's authority, and relied on by the creditor in a transaction in the ordinary course of trade, all the partners are bound, whatever their liability *inter se*. White *v.* Kearney, 2 La. Ann. 639.

Partners are liable for all debts con-

[1] The presumption is, that contracts made by a partner are made on account of the partnership, and the firm will be bound thereby, unless the parties with whom he contracts know the contrary. Le Roy, Bayard & Co. *v.* Johnson, 2 Pet. 198; Rochester *v.* Trotter, 1 A. K. Marsh, 54.

2. That if an act is done by one partner on behalf of the firm, and it was not necessary for carrying on the partnership business in the ordinary way, the firm will *primâ facie* be not liable.

In the first case the firm will be liable unless the one partner had in fact no authority to bind the firm, and the person dealing with him was aware of that want of authority; whilst in the second case the firm will not be liable unless an authority to do the act in question, or some ratification of it, can be showed to have been conferred or made by the other partners. (*c*)

Secret partnerships.

The doctrine that each member of any ordinary firm is its implied agent for the transaction of its business in the ordinary way, is generally laid down without qualification. But it is questionable whether this rule applies to a case in which a person who happens to be a member of a firm, but who is not known to be such, and who has in fact no authority to act for it,

tracted by either of the partners, in respect to their business, notwithstanding an agreement between them that they should not be so bound. Sauffey *v.* Howard, 7 Dana, 667. See, also, Coons *v.* Renick, 11 Tex. 134.

Either partner in a firm can bind himself by using the firm name in an affair having no connection with its business, but the liability would extend no further as long as the party dealing with him understood him to be using the firm name for the convenience of another person, and outside of the scope of its business. Merchant *v.* Belding, 49 How. Pr. 344.

A partner is bound by the act of his co-partner, within the scope of the business of the firm, even if that act be fraudulent as between the partners. Capelle *v.* Hall, 12 Bankr. Reg. 1.

Where one, without the knowledge or consent of his co-partners, made to an agreement executed between the firm and third persons, an addition, signing the firm name thereto, giving such third person the privilege, at any time within three months after a change in the firm in any way affecting their interests, to purchase the property on hand, owned by the firm and resulting from the fulfillment of the original contract upon specified terms: *Held*, that the proposed contract was valid, the third persons not knowing of the fraud. Draper *v.* Moore, 2 Cin. 167.

The purchase of real estate may or may not be within the scope of the partnership business. Lewis, John A., and Isaac Cook, were co-partner's engaged in the business of general merchandising, under the firm name of "Cook Bros." Lewis was the resident partner; John A. and Isaac were non-residents. Lewis Cook purchased a stone storehouse and a lot of stationery, in his individual name, and in paying therefor, gave the notes sued upon in this action, in the firm name: *Held*, in reviewing all the testimony, that Lewis Cook in making this purchase acted within the scope of the partnership business, and that the knowledge of such purchase was not sufficient to put the plaintiff upon inquiry as to the consent of the other partners. Davis *v.* Cook, 14 Nev. 265.

(*c*) See Dickinson *v.* Valpy, 10 B. & C. 128, and Crellin *v.* Brook, 14 M. & W. 11, where there was sufficient ratification.

takes upon himself so to do. Real authority is excluded by hypothesis; and it is difficult to see from what, in such a case, any authority can be implied. If, indeed, he was known to be a partner, whether by his own representations or otherwise, his authority to act for the firm would be properly inferred. But the case supposed excludes all knowledge of his position, and under such circumstances it is conceived there can be no apparent as distinguished from real authority. (*d*)

Authority of dormant partner.

Again, with respect to the liability of dormant partners: a distinction must be drawn between—first, undisclosed principals who carry on a business by partners or agents; and, secondly, persons who simply share the profits of a business carried on by others on their own account, *i. e.*, as principals only, and *not as agents for those who share their profits. In the first case the dormant partners are liable for whatever may be done by their partners and agents in the course of transacting the business in the ordinary way;[1] but in the second case the so-called dormant partners are not principals at all, the persons who carry on their business do not carry it on as their agents either really or apparently, and the doctrines applicable to undisclosed principals are altogether excluded. (*e*)

Liability of dormant partners.

*238

It will be observed, that what is necessary to carry on the partnership business in the ordinary way, is made the test of authority where no actual authority or ratification

Necessity the limit of authority.

(*d*) See the judgment of Cockburn, C. J., in Nicholson *v.* Ricketts, 2 E. & E. 524, and of Cleasby, B., in Holme *v.* Hammond, L. R. 7 Ex. 233.

[1] The credit given in case of a dormant partnership, though manifestly given to the ostensible partner, is not to be presumed to be exclusive, but all for whom such partner acts, if in their business and for their benefit, will be liable. Richardson *v.* Farmer, 36 Mo. 35.

Where promissory notes, offered by the acting partner at a bank, in the usual course of partnership business, are discounted, and the money is subsequently misapplied, the holders, not being privy thereto, have a right of action against the dormant partners. Winship *v.* Bank of United States, 5 Pet. 529.

By the law merchant, a man may be answerable as a dormant partner on a contract made by the partnership of which he is in fact a member; but this law is confined to trade and commerce, and does not extend to speculations in the purchase and sale of lands; for where lands are sold, no man, as a dormant partner, can claim any part of the lands by virtue of any conveyance to which he is not, on the face of it, a party. Pitts *v.* Waugh, 4 Mass. 424.

(*e*) This distinction is rendered necessary by the decision of the House of Lords, in Cox *v.* Hickman. See *ante*, pp. 38–43.

can be proved. This is conformable to the most recent and carefully considered decisions; but by adopting it the liability of a firm for the acts of its co-partners is not so extensive as non-lawyers sometimes imagine. The act of one partner to bind the firm must be *necessary* for the carrying on of its business; if all that can be said of it was that it was convenient, or that it facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners. (*f*)

Extraordinary necessity.

Nor it seems will necessity itself be sufficient if it be an extraordinary necessity.[1] What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test; and therefore, in a case where the nature of the business was one in which there was no necessity to borrow money to carry it on under ordinary circumstances and in the ordinary manner, the Court held the firm not liable for money borrowed by its agent under extraordinary circumstances, although money was absolutely requisite to save the property of the firm from ruin. (*g*) This case is an authority for saying that a power to do what is usual does not include a power to do what is unusual, however urgent; and although in the case referred to, the money was not borrowed by a partner, but by a person who was only an agent of the *239 firm, the decision would, it is apprehended, have *been the same if he had been a partner. For notwithstanding the fact that every partner is to a certain extent a principal as well as an agent, the liability of his co-partners for his acts can only be established on the ground of agency. As their agent he has no discretion except within the limits set by them to his authority, and the fact that he is himself, as one of the firm, a principal, does not warrant him in extending those limits, save on his own responsibility. (*h*)

Discretion in urgent cases.

The question whether a given act can or cannot be said to be necessary to the transaction of a business in the way in which it is usually carried on, must evidently be determined by the nature of the business, and by the practice of persons en-

Nature of the business the test of necessity.

(*f*) See Brettel *v.* Williams, 4 Ex. 630.

[1] As to the enlargement of the authority of an agent in emergencies requiring it, see Ewell's Evans on Agency, *123, note.

(*g*) See Hawtayne *v.* Bourne, 7 M. & W. 595; and see *Ex parte* Chippendale, 4 De G. M. & G. 19.

(*h*) See Ricketts *v.* Bennett, 4 C. B. 686, and Dickinson v. Valpy, 10 B. & C. 128.

gaged in it.[1] Evidence on both of these points is therefore necessarily admissible,[2] and, as may readily be conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for carrying on another, in the ordinary way.

[1] The authority of a partner is limited to things done in the regular course of the business of the firm; outside of this he has no authority. If he attempts to mortgage or assign under suspicious circumstances, such act would be of no effect as against the parties injured thereby. A transfer by a partner of the joint effects in fraud of a co-partner will constitute the transferee who received them with notice, as without consideration, a trustee for the benefit of the firm or its creditors. If the joint funds were employed by one partner to purchase property, either in his own name or that of another, with the intent to defraud his co-partner, or the creditors of the firm, the property so purchased will be treated as trust funds for the firm and its creditors. Stegall *v.* Coney, 49 Miss. 761.

A partnership to effect a special end binds the members for each other's acts only in the prosecution of that end, unless an authority may be implied from the method of transacting business. Town *v.* Hendee, 27 Vt. 258.

One partner has no right, without the assent of the others, to bind the firm for his individual account. Atkin *v.* Berry, 1 Lea (Tenn.), 91.

Partnership in a patent-right, as for the navigation of steam-vessels, does not authorize one partner to bind the partnership in a matter, as for building steamboats, not strictly connected with the enjoyment of their joint privileges. Lawrence *v.* Dale, 3 Johns. Ch. 23.

A co-partnership formed to transport passengers and their baggage by a line of stages, does not, from the mere nature of the business, authorize one of the partners to bind the firm by an agreement that he will convey a person a certain distance in a specified time. Walcott *v.* Carfield, 3 Conn. 194.

The mere fact that the defendants are partners in the practice of medicine, does not render them jointly liable for the expenditures of each other, having no connection with their partnership business as physicians. Thompson *v.* Howard, 2 Ind. 245.

One partner cannot make himself the agent of his firm to subscribe stock to a railroad company, the building of railroads not being within the scope of the partnership. Livingston *v.* Pittsburg, etc. R. R. Co. 2 Grant Cas. 219.

But where partners who were mainly engaged in the oyster business had at different times engaged together in various transactions, and among other things had once or twice dealt in railroad stocks: *Held*, upon this evidence, that a jury were justified in finding a subscription for railroad stock, made by one partner in the firm name, to be within the scope of the partnership business. Maltby *v.* North-western, etc. R. R. Co. 16 Md. 422.

A contract, creating in fact a new partnership between two different firms, though both engaged in the same business, cannot be made on behalf of either firm by a single member thereof, but requires the consent of all the members. Buckingham *v.* Hanna, 20 Ind. 110.

So the assent of a member of a particular firm is necessary to engage him as a member of a new firm; and the general authority given by all to each, or even to the acting or managing partner, to bind the whole company, does not extend to the erection of new companies,

[2] See *ante*, p. 236, note.

Consequently, no answer of any value can be given to the abstract question—can one partner bind his firm by such and such an act? unless, having regard to what is usual in business, it can be predicated of the act in question, either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which any such assertions can be truly made. The great majority of acts, and practically all which give rise to doubt, are those which are necessary in one business and not in another. Take, for example, negotiable instruments: it may be necessary for one member of a firm of bankers to draw, accept, or indorse a bill of exchange on behalf of the firm, and to require that each member should put his name to it would be ridiculous; but it by no means follows, nor is it in fact true, that there is any necessity for one of several solicitors to possess a similar power, for it is no part of the ordinary business of a solicitor to draw, accept, or indorse bills of exchange. The question, therefore, can one partner bind the firm by accepting bills in its name? admits of no general answer: *240 the nature of the business and *the practice of those who carry it on (usage or custom of the trade) must be known before any answer can be given. (*i*)

The question when the agency of a partner begins and ends will be examined hereafter. See bk. ii. c. 2, § 3.

composed of new members. Tabb *v.* Gist, 6 Call, 279.

McC., a member of a firm, entered into the following contract: "Rec'd of W. F. McC. $20, for which sum I, N. L. T., agree to give the said W. F. McC. any profits that I may have on a lot of 5,350 pounds of wool, over and above costs and freight. And I, W. F. McC., agree to pay any loss that may be made in sale of wool under $1,328.75, and freight. (Signed,) N. L. T., W. F. McC." There was a loss of $298.02 on the sale of the wool. McC. was in partnership with N. in the grain business, but concealed the written contract, as also did T. N. was informed that the only risk was the $20, and was not aware of the character of the contract until after the sale of the wool: *Held*, without proof of prior authority to purchase the wool, or knowledge of the contract and its terms, N. could not be held liable, the contract not having been made for the firm. Norton *v.* Thatcher, 8 Neb. 186.

Surrendering notes to a firm of which the maker is a member, is not necessarily equivalent to a surrender of them to him, whereby they become extinguished. Succession of Dolhonde, 21 La. Ann. 3.

Ordinary partners are not bound *in solido* for attorney's fees for services rendered the firm under the employment by one of its members. In such a case, each one of the partners is bound for his share, if no agreement has been made between the attorney and the partner who employed him. Hyams *v.* Rogers, 24 La. Ann. 230.

See the general subject of the implied

SECTION II.—GENERAL PRINCIPLES OF AGENCY AS APPLIED TO JOINT-STOCK COMPANIES.

The doctrine that each member of an ordinary partnership is the agent of the firm for the transaction of its business in the ordinary way has no application to joint-stock companies. Before a company is formed, those engaged in forming it are not partners, and are not each other's agents for doing that which may be necessary to form the company; and after a company is formed, the transaction of its business is notoriously entrusted to a few directors or managers, and the other members take no part in it.

Application of the foregoing principles to companies.

1. *What persons are agents of companies.*

(*a*) *Companies in the process of formation.*

It was formerly held that persons engaged in establishing companies were partners; but, as has been already seen, this doctrine is clearly not law at the present day. (*k*) Associations for forming partnerships, not being partnerships, it follows that persons who hold themselves out as members of such associations do not thereby hold themselves out as partners, either with each other or with their co-members. From this it results further that, in order that a person engaged with others in forming a company may be liable for their acts, he must have authorized them to do those acts as his agent, or have ratified such acts. The authority conferred may be general or special; but unless it is held —which it is not (*l*)—that the pursuit of a common object by persons in concert gives each an authority to act as the agent of the others in whatever he *thinks tends to the attainment *241 of that object, it must be held that no one is liable for the acts of the others except so far as he has, in some definite manner, constituted them his agents or ratified what they have done.

1. As regards companies not yet formed.

The cases of Bourne *v.* Freeth (*m*), Dickinson *v.* Valpy (*n*), and Fox *v.* Clifton (*o*), all of which have been already noticed, are distinct authorities for the proposition that

Subscribers not liable for acts of promoters.

authority of partners considered, *post*, p. 264, *et seq.* and note.

(*i*) See Taunton *v.* Royal Ins. Co. 2 Hem. & M. 135.

(*k*) *Ante*, pp. 31, *et seq.*

(*l*) See, in addition to the cases cited below, Heraud *v.* Leaf, 5 C. B. 157.

(*m*) 9 B. & C. 632.

(*n*) 10 B. & C. 128.

(*o*) 6 Bing. 776; and 9 ib. 115.

the allottees of shares in an unformed company are not, as such, liable for the acts of its managers.

Promoters of companies not each other's agents. Reynell v. Lewis. Wyld v. Hopkins.

The doctrine that the promoters of companies are not, as such, each other's agents,[1] and liable for each other's acts, appears to have been first distinctly laid down by the Court of Exchequer in Reynell *v.* Lewis and Wyld *v.* Hopkins (*p*), which were actions brought by advertising agents and map makers against members of the provissional committees of two railway companies. In each of these cases prospectuses and advertisements had been issued by the provisional committee, and the name of the defendant, as a member of the committee, was therein announced to the public. In each case the plaintiff had been directly employed by the solicitor to the committee, and in neither case had the defendant authorized his credit to be pledged to any one, except so far as his being a member of the committee, and knowing what was going on, was to be regarded as conferring an authority to that effect. In both cases the jury found verdicts for the plaintiffs. In both, however, the court granted new trials, and (in a judgment well worthy of attentive perusal) it was distinctly laid down, that the members of provisional committees are not partners; that they are not even *primâ facie* each other's agents; and that, in order to render any member liable for the acts of the others, it is incumbent upon those who assert that such liability exists, to prove, to the satisfaction of a jury, the existence of an authority emanating from the member in question to the others to bind him. At the same time it was as distinctly laid down that a general authority, conferred by a defendant on his co-committee men or any other person, and *242 sufficient to make their acts his, *might be properly inferred from public announcements, and that a special authority for each act was by no means essential to render him liable for it. (*q*) But no such general authority is to be assumed from the mere announcement that several persons are acting together, and endeavoring to get up a company.

[1] See Evans on agency, 29, 158.

(*p*) Both in 15 M. & W. 517. Compare Maddick *v.* Marshall, 16 C. B. N. S. 387, and 17 ib. 829.

(*q*) See, accordingly, Collingwood *v.* Berkeley, 15 C. B. N. S. 145; Maddick *v.* Marshall, 16 ib. 387, and 17 ib. 829; Barnett *v.* Lambert, 15 M. & W. 489; Higgins *v.* Hopkins, 3 X. 163; Lake *v.* Argyll, 6 Q. B. 477; Maitland's case, 4 De G. M. & G. 769. See Newton *v.* Belcher, 12 Q. B. 921, and Newton v. Liddiard, ib. 925, as to mistaken admissions of liability. See as to contribution

The principles laid down above have been since constantly recognized and acted upon, as will be seen by reference to the numerous cases cited below, in many of which the defendant was a member, not only of a provisional committee, but of a managing committee also. (*r*) The appointment, by a provisional committee, of a managing committee, does not *per se* render the members of the former liable for the acts of the latter. (*s*)

Members of provisional or managing committees.

It follows from the same principle that the acts, statements and letters of one member of a committee formed for getting up a company cannot prejudice any other member, unless the first can be shown to be the agent of the last by some other circumstance than their common object; nor is the receipt of deposits by one member equivalent to a receipt of them by the others. (*t*)

Acts of one no evidence against the others.

The liabilities of companies for the acts of their promoters will be examined hereafter in bk. ii. c. 2, § 3, p. 395.

*(*b*) *Formed companies.* *243

The circumstance that a joint-stock company consists of a large and fluctuating body of members is itself sufficient to prevent the application to companies of the ordinary partnership rule, that each member of a firm is its agent, for the purpose of carrying on its business. All persons dealing with companies are supposed to know this, and to know that the management of their affairs is entrusted to a few individuals who, and who alone, have power to act for them. (*u*)

2. As regards companies which are formed.

amongst promoters, Lefroy *v.* Gore, 1 Jo. & Lat. 571.

(*r*) Bailey *v.* Macaulay, 13 Q. B. 815; Barker *v.* Stead, 3 C. B. 946; Rennie *v.* Wynn, 4 Ex. 691; Nevins v. Henderson, 5 Ra. Ca. 684; Wood *v.* Argyll, 6 Man. & Gr. 928; Patrick *v.* Reynolds, 1 C. B. N. S. 727; McEwan *v.* Campbell, 2 McQu. 499; Rennie *v.* Clarke, 5 Ex. 292; Bell *v.* Francis, 9 C. & P. 66; Kerridge *v.* Hesse, 9 C. & P. 200; Barrett *v.* Blunt, 2 C. & K. 271; Barker *v.* Lyndon, ib. 651; Giles *v.* Cornfoot, ib. 653; Griffin *v.* Beverley, ib. 648; Brenmer *v.* Chamberlayne, ib. 569.

(*s*) Cook *v.* Tomkin, 3 Q. B. 936; Williams *v.* Pigott, 2 Ex. 201; Dawson *v.* Morrison, 5 Ra. Ca. 62.

(*t*) See Burnside *v.* Dayrell, 3 Ex. 224; Rennie *v.* Wynn, 4 Ex. 691; Watson *v.* Charlemont, 12 Q. B. 856; Drouet *v.* Taylor, 16 C. B. 671. Compare Rennie *v.* Clarke, 4 Ex. 292; Wontner *v.* Shairp, 4 C. B. 404; Maddick *v.* Marshall, 16 C. B. N. S. 387, and 17 ib. 829.

(*u*) See Ridley *v.* The Plymouth

Company not bound by the acts of its members.

Burnes v. Pennell.

Burnes *v.* Pennell (*x*), in the House of Lords, is a good illustration of the doctrine that a company is not, like an ordinary partnership, responsible for the acts of its members. In that case a shareholder in a company, who was also its solicitor and law agent, induced a person, by false representations as to the flourishing state of the company, to buy shares in it. The purchaser being afterwards sued for calls, relied upon the fraud as a defense, and he also sought to have the transfer of the shares to him cancelled. But it was held that it was no part of the business of the company's solicitor to make any representations on its behalf as to its condition; and that, although he was himself a shareholder, his statements were not the statements of the company, he not being, in his character of shareholder, an agent of the company for any purpose whatever.

Whether the company is incorporated or not, whether it is a chartered company, a registered company, a company merely empowered to sue and be sued by a public officer, or a company of some other description, is of no consequence whatever as regards the question here alluded to; the same reason applies to them all. (*y*)

*244 **Directors.*

Directors the agents of the company.

The directors, then, of a company, and such other persons, if any, as may be entrusted with the management of its affairs, are its only agents; and by the acts of its directors a company is bound, provided those acts are within the limits of their real or apparent authority; and provided the person dealing with them has had no notice of the irregularity (if any) of their proceedings. (*z*) Moreover the power of directors to bind the company is not affected by any irregularity in their own appointment if the person dealing with them acted *bonâ fide* and without notice of such irregularity. (*a*)

Grinding and Baking Co. and Kingsbridge Flour Mill *v.* Same, 2 Ex. 711; Smith *v.* Hull Glass Co. 11 C. B. 897; Ernest *v.* Nicholls, 6 H. L. C. 401, *per* Lord Wensleydale; Burnes *v.* Pennell, 2 H. L. C. 497.

(*x*) 2 H. L. C. 497.

(*y*) See Lord Campbell's judgment in Burnes *v.* Pennell, 2 H. L. C. 520, *et seq.* and Bramah *v.* Roberts, 3 Bing. N. C. 963.

(*z*) See *infra*, as to this.

(*a*) County Life Ass. Co. 5 Ch. 288.

But it by no means follows that each director is the agent of the company. Speaking generally, it is clear that if a person appoints six others to be his agents jointly, he is not bound by the acts of any five, four, three, two or one of them.[1] Therefore, if the affairs of a company are entrusted to the management of not less than a fixed number of directors, it is *primâ facie* not bound by the acts of a fewer number. It has been held, for example, that two out of several directors had no power to waive a forfeiture (*b*), or to allot shares (*c*); that four out of five had no power to compromise a large debt due to the company and to indemnify the debtor against certain bills of exchange (*d*); that six out of eight had no power to bind the company to pay for services rendered pursuant to their order (*e*); that four out of five had no power to bind the company by an agreement for a lease (*f*); that the representations of one director could not be regarded as those of the company (*g*); that notice to one director did not affect the company (*h*); that instructions to sell land given to an auctioneer by one director and by the solicitor of a company could not, without further evidence, be considered as having been given *by the company (*i*); that one liquidator out of four *245 could not bind the company by a bill. (*j*)

Acts done by less than the proper number of directors.

Moreover, directors being themselves agents, are *primâ facie* unable to delegate their authority to one or more of their

Delegation of authority.

[1] See Ewell's Evans on Agency, *32 and note.

If an agency be given to two, as partners, by their partnership name, an execution of the power by one, in the name of the firm, will bind the principal. Gordon *v.* Buchanan, 5 Yerg. 71.

Where one member of a law partnership obtained possession of a letter containing an authority to take care of the writer's interests, directed to the other partner, and acted under the instructions contained in the letter: *Held*, that the writer was bound by the act of the partner, as much so as if the other partner had received the letter and acted upon it. Beck *v.* Martin, 2 McMull. 260.

One member of a partnership who are the agents of an insurance company, has all the powers of the firm in making a parol contract of insurance. Kennebeck Co. *v.* Augusta Ins. etc. Co. 6 Gray, 204.

(*b*) Card *v.* Carr, 1 C. B. N. S. 197.

(*c*) Howard's case, 1 Ch. 561.

(*d*) Kirk *v* Bell, 16 Q. B. 290.

(*e*) Brown *v.* Andrews, 13 Jur. 938.

(*f*) Ridley *v.* Plymouth Grinding Co. 2 Ex. 711.

(*g*) Holt's case, 22 Beav. 48; Nicol's case, 3 De G. & J. 387.

(*h*) *Ex parte* Credit Foncier and Mobilier of England, 7 Ch. 161.

(*i*) Moody *v.* Lond. and Brighton, Rail Co. 1 B. & Sm. 290.

(*j*) *Ex parte* Birmingham Banking Co. 3 Ch. 651.

own number (*k*)[1]; but in many companies, and in all which are governed by Table A. in the schedule to the Companies act, 1862, the directors are authorized to delegate their powers to a few, and even to one only, of themselves; and such a delegation will be presumed if one or two directors act for the company in a matter incidental to its legitmate business. (*l*)

Where the proper number of directors does not exist.

Where the power to act for a company is vested in a given number of directors, and that number does not exist, the company has no agents by which it can properly transact its business. At the same time, if a company does in fact carry on business by certain persons who are allowed by the shareholders to act as if they were the duly constituted directors of the company the company will be bound by the acts of such persons in all ordinary matters of business in favor of all persons *bonâ fide* dealing with them, without notice of their insufficiency in number or defective appointment. (*m*) But as to matters out of the ordinary course of business the company will not be bound. In Kirk *v.* Bell (*n*), where a company's deed of settlement contained a clause to the effect that there should not be less than five directors, and that three should be a quorum for the transaction of ordinary business, and where there were in fact only four directors, it was held that a deed executed by these four on behalf of the company did not bind it, the deed being of an unusual description, and not a matter of ordinary business.

Kirk v. Bell.

Closely connected with the present subject is the question *246 *whether an act which ought to be done by a *Board* of directors is valid when done by the requisite number but not at a board meeting. There certainly is authority for answering this question in the negative (*o*);[2] and as

Acts done by directors but not by a board.

(*k*) Cartmell's case, 9 Ch. 691; Howard's case, 1 Ch. 561; *Ex parte* Birmingham Banking Co. 3 Ch. 651; Cook v. Ward, 2 C. P. D. 255.

[1] See Evans on Agency, 44, 45.

(*l*) Totterdell *v.* Fareham Brick Co. L. R. 1. C. P. 674; Lyster's case, 4 Eq. 233; *Ex parte* The Contract Corporation, 3 Ch. 116.

(*m*) See Mahony *v.* East Holyford Mining Co. L. R. 7 H. L. 869; Thames Haven Dock Co. *v.* Rose, 4 Man. & Gr. 552, a case relating to calls where the court was asked to set aside a judgment.

(*n*) 16 Q. B. 290.

(*o*) Bosanquet *v.* Shortridge, 4 Ex. 699; Darcy *v.* Tamar, etc. Rail. Co. L. R. 2 Ex. 158.

[2] Where the constitution of a private association provides that an act shall be done by and with authority of the directors, the authority of the directors acting together as a board is required; and the assent of the individual directors, separately given, is not sufficient. Skinner *v.* Dayton, 5 Johns. Ch. 351.

between the company and any person having notice of the irregularity, that answer is probably correct. But as between the company and persons having no notice of the irregularity, the preponderance of authority is in favor of holding the company bound. (*p*)

Moreover, in order that a majority of persons present at a meeting may exercise the powers of a meeting, the meeting itself must not be too small. (*q*)

Directors not the agents of each other.

Although the directors of a company are the agents of the company, and although, as a member of the company, each of the directors is liable for the acts of its agents on the same ground as other members, still, unless a director has done something to make his co-directors his agents in some other sense than this, he is no more liable for their acts than any other shareholder. In this respect directors are like promoters, each being answerable for his own acts and for the acts of the others so far as he has made them his agents, but no further. (*r*)

Agents who are not directors.

Agents who are not directors.

The directors of a company are not necessarily its only agents. It may, and indeed generally must, be competent for them to employ other persons to act for the company;[1] and where this is the case, those persons also will have power to bind the company within the limits of their agency, but not *further. In dealing with the agents of companies there is *247 great danger of finding their authority altogether repudiated,

(*p*) See Mahony *v.* East Holyford Mining Co. L. R. 7 H. L. 869; Collie's claim, 12 Eq. 246; County Life Ass. Co. 5 Ch. 288. In Collie's claim it was said, but surely not correctly, that D'Arcy *v.* Tamar, &c. Rail. Co. turned on a technical rule of pleading. See, further, the cases as to irregularities cited *infra*.

(*q*) Howbeach Coal Co. *v.* Teague, 5 H. & N. 151; *Ex parte* Morrison, De Gex, 539.

(*r*) See Brown *v.* Byers, 16 M. & W. 252; Heraud *v.* Leaf, 5 C. B. 157; Bramah *v.* Roberts, 3 Bing. N. C. 963; Lord Londesborough's case, 4 De G. M. & G. 411; Walker's case, 8 De G. M. & G. 607. The liability of directors to the shareholders is not here in question. See, as to this, book iii. c. 1, § 1.

[1] By the articles of agreement under which an unincorporated manufacturing association went into operation, it was declared to be the duty of the president and directors to appoint a general agent to transact the business of the firm, under the direction of the president and directors. *Held*, that the president and directors might transact the business of the company without the appointment of an agent. Skinner *v.* Dayton, 19 Johns. 513.

on the ground that they have not been duly appointed. Now, although directors have no implied power to delegate the authority conferred upon themselves, yet they must necessarily employ persons not only to do the every-day work of the company, but also to transact special branches of business requiring peculiar knowledge.[1] Upon principle, therefore, where persons are in fact employed by directors to transact business for a company the authority of those persons to bind a company within the scope of their employment cannot be denied by the company, unless—1, their employment was altogether beyond the power of the directors; or unless, 2, the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity. (*s*) Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bonâ fide* and without notice of the irregularity in his appointment. The following cases are important on this point.

In Smith *v.* The Hull Glass Company (*t*), it was held that a company registered under 7 & 8 Vict. c. 110, was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorized by the directors to order the goods in question. Maule, J., went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bonâ fide* with such persons, have a right to assume that they have been duly appointed. (*u*)

Smith v. Hull Glass Company.

This view is in accordance with later authorities. Thus, a company has been held bound by a verbal contract with the *248 *chairman of directors, although a sealed contract countersigned by three directors was required by the company's deed

[1] See the doctrine of the delegation of authorities, and the exceptions to the general rule upon the subject, considered in Ewell's Evans on Agency, pages 38, 42, and notes.

(*s*) See Hawken *v.* Bourne, 8 M. & W. 703, and the cases cited in the next few notes.

(*t*) 8 C. B. 668, and 11 ib. 897.

(*u*) See 11 C. B. 927. The other judges relied more on the fact that the directors had sanctioned and adopted the contracts. But as the knowledge on the part of the directors of what was done was assumed rather than proved, there was little if any difference in the views of the different members of the Court.

of settlement (*x*); so by orders for repairs given by a secretary instead of by the directors (*y*); so by an agreement for the sale of land made by a company's manager who was allowed by the directors to make such contracts (*z*); so by cheques drawn by *de facto* but improperly appointed directors. (*a*) Again, in Giles *v.* The Taff Railway Company (*b*), it was held that a railway company was liable for a tort committed by one of its servants in the course of his employment, although there was no proof, except that afforded by the fact of employment, that he was the servant of the company.

Giles v. Taff Railway Company.

Even as between the agent himself and the company, if the directors appoint him and allow him to act as agent of the company, and he does so act *bonâ fide* and without notice of any irregularity in his appointment, the company will be liable to him for his salary although he may not have been appointed precisely in the manner prescribed by the regulations of the company. (*c*)

Browning v. Great Central Mining Company.

These cases must not be confounded with others in which companies have been held not bound by acts done by their agents when acting beyond the limits set by the nature of their employment. (*d*)

Limits to authority of agent.

*2. *Authority of agents of companies.* *249

Having seen who are to be considered agents of a company, it is necessary to examine the limits within which a company is answerable for their acts. The first question

Limits of the directors' authority.

(*x*) Reuter *v.* Electric Telegraph Co. 6 E. & B. 341.

(*y*) Allard *v.* Brown, 15 C. B. N. S. 468.

(*z*) Wilson *v.* West Hartlepool Rail. Co. 34 Beav. 187, affd. 2 De G. J. & Sm. 475. Compare Moody *v.* London and Brighton Rail. Co. 1 Best & Sm. 290.

(*a*) Mahony *v.* East Holyford Mining Co. L. R. 7 H. L. 869.

(*b*) 2 E. & B. 822. See, further, *infra*, § 4.

(*c*) Browning *v.* Great Central Mining Co. 5 H. & N. 856. In this case an appointment under the seal of the company was not necessary. See also Totterdell *v.* Fareham Brick Co. L. R. 1 C. P. 674.

(*d*) See as to buying shares, Cartmell's case, 9 Ch. 691; as to policies of insurance issued by local agents, Linford *v.* Provincial Horse and Cattle Insurance Co. 34 Beav. 291; as to orders by station masters for surgical attendance, Cox *v.* Midland Counties Rail. Co. 3 Ex. 268; Walker *v.* Great Western Rail Co. L. R. 2 Ex. 228; statements by solicitors as to the flourishing condition of the company, Burnes *v.* Pennell, 2 H. L. C. 497; sales by a solicitor not instructed to sell by the directors, Moody *v.* Lond. and Brighton Rail. Co. 1 B. & Sm. 290.

which arises with reference to this subject is, whether the directors are to be regarded as the general agents of the company, for the purpose of transacting its business, or whether they are to be regarded as its special agents for certain defined purposes, and for those only? Upon this question opinions have greatly differed, but the tendency of the courts is in favor of holding directors to be special rather than general agents. At the same time it is established that what the directors of a company have power to do, and do in the name of the company and on its behalf (*e*), binds the company, although they may not have acted in the manner prescribed by the regulations of the company. A distinction is thus taken between what directors have no power to do at all, and what they have power to do, provided certain requisites are observed; in other words, between acts which are altogether *ultra vires* and those which are *intra vires* but irregular; and whilst it is held that companies are not bound by acts of the former class, it is held that they are bound by acts of the latter class in favor of all persons dealing with their directors *bonâ fide* and without notice of the irregularities of which they may be guilty. (*f*)

Distinction between acts *ultra vires* and acts *intra vires*, but irregular.

(*a*) *Of acts which are ultra vires.*

With respect to those acts which directors have no power to do at all, it must be borne in mind that trading and similar corporations which are created for certain definite purposes have no greater capacity than is conferred upon them by their constitution. They exist for certain purposes, more or less well defined in the instrument incorporating them, but they *250 *exist for no other purposes; and a corporation created for one purpose cannot lawfully do anything which is foreign to the purpose for which alone it was created. If, therefore, it can be predicated of any contract entered into by or on behalf of a body corporate, that such contract is one into which the corporation, even with the assent of all its members, cannot legally enter, such contract must necessarily be invalid. This is not the consequence of any doctrine of the law of agency, but of the nature of corpora-

Acts altogether *ultra vires*.

(*e*) See Hambro' *v.* Hull, &c., Insurance Co. 3 H. & N. 789.

(*f*) See generally on the subject of the ensuing pages a treatise on the doctrine of *ultra vires* by Seward Brice.

tions, and of the difference between them and ordinary individuals.(*g*) This principle applies to joint stock companies. But there is an important difference between incorporated and unincorporated companies, for whilst it is competent for *all* the shareholders of an unincorporated company to depart from the agreement entered into by each with the others, it is not competent for all the shareholders of a company incorporated by charter or statute to do anything contrary thereto. (*h*) Nor can a corporate body be estopped by deed or otherwise from showing that it had no power to do that which it purports to have done. (*i*)

Powers of directors limited by the constitution of the company.

The constitution of a company as settled by its charter, act of Parliament, memorandum of association, or deed of settlement, limits, to a certain extent, the powers of its directors; for whatever it may or may not be competent for all the shareholders to do, it certainly is not competent for the directors of a company to bind it by entering on its behalf into transactions not warranted by its constitution as settled for the time being. (*k*) The directors of a company have authority to do whatever is necessary for the transaction of the company's legitimate business in the way in which such business is usually carried on by other people (*l*), but they have no power *to engage in a class of business for the transaction of *251 which the company was not formed. (*m*)

Capacity of corporations.

With respect to the capacities of trading and similar corporate bodies to bind themselves by contracts, there is an apparent difference of opinion upon the question whether the burden of proof is upon those who assert that the power to enter into any particular contract exists or upon those who assert the contrary.

(*g*) See upon this subject, Pollock on Contracts, 93 *et seq.*, and the cases referred to *infra*, notes (*n*) and (*o*). As to the consequences of a corporation taking securities which it ought not to take, see Ayers *v.* S. Australian Banking Co. L. R. 3 P. C. 548.

(*h*) See Ashbury Railway Carriage Co. *v.* Riche, 7 H. L. 653; Society of Practical Knowledge *v.* Abbott, 2 Beav. 559, and Bagshaw *v.* Eastern Union Rail. Co. 7 Ha. 114.

(*i*) See Fairtitle *v.* Gilbert, 2 T. R. 169. Compare Webb *v.* Commissioners of Herne Bay, L. R. 5 Q. B. 642, where the company had power to issue debentures, although they did not properly exercise the power.

(*k*) Ashbury Railway Carriage Co. *v.* Riche, L. R. 7 H. L. 653.

(*l*) Smith *v.* Hull Glass Co. 8 C. B. 668; Taunton *v.* Royal Ins. Co. 2 Hem. & M. 135.

(*m*) The cases on this head are excessively numerous, and will be noticed hereafter.

It is agreed on all hands that a corporation cannot lawfully do that which its constitution does not expressly or impliedly warrant. The difference of opinion, if there really be any, is not as to that, but simply as to whether the act of incorporation is to be regarded as conferring unlimited powers except where the contrary can be shown; or whether alleged corporate powers are not rather to be denied unless they can be shown to have been conferred either expressly or by necessary implication.

The former is apparently the correct view so far as municipal and other corporations not created for any clearly limited purpose are concerned (*n*); but the latter is submitted to be the correct view with respect to trading and similar corporations which are created for certain definite purposes only. (*o*) That such corporaporations cannot do that which their constitution does not warrant admits of no doubt, and is conclusively established by the decision of the House of Lords in Ashbury Railway Carriage Co. *v.* Riche. (*p*) In that case it was held that a com-

Ashbury, &c. Co. *v.* Riche.

*252 pany formed and registered under the Companies *act, 1862, for contracting to supply materials for making railways, and to carry on the business of general contractors, was not bound by a contract to make a railway, although such contract had been entered into by directors of the company, and had been afterwards approved by the shareholders. (*q*) Such a contract was not authorized by the company's memorandum of association and could not bind the company in its corporate character, even although every shareholder in it might have assented to it.

Companies' articles of association and deeds of settlement usually prescribe certain limits to the powers of their directors, rendering them much less extensive than they would be if limited merely by the purpose for which the

Public bound to notice the regulations of the company.

(*n*) See the authorities cited, L. R. 9 Ex. 262, *et seq.*

(*o*) The leading case on this subject is Ashbury Railway Carriage Co. *v.* Riche, L. R. 7 H. L. 653, and 9 Ex. 224. In the arguments and judgments reference will be found to all previous authorities. The case itself does not settle the question as to the *onus probandi*. Lord Selborne's judgment, L. R. 7 H. L. 693, is in favor of the view in the text; but the judgment of Lord Blackburn, 9 Ex. 262, *et seq.*, is opposed to it, and although the House of Lords dissented from him in the conclusion at which he ultimately arrived, Lord Selborne alone expressed dissent from him with respect to the burden of proof.

(*p*) L. R. 7 H. L. 653; S. C. L. R. 9 Ex. 224, 249.

(*q*) Compare Sheffield Nickel Co. *v.* Unwin, 2 Q. B. D. 215, where what was done was within the scope of the memorandum of association.

companies are formed; and opinions have differed upon the question whether the public, in dealing with the directors of companies, is or is not bound to ascertain the real limits set to their authority.(r) But it is now settled that persons are bound to ascertain these limits when dealing with companies whose regulations are registered, and are therefore accessible to the public. Accordingly in Balfour *v.* Ernest (s), it was held, that an insurance company was not bound by a bill of exchange accepted by its directors on its behalf for a debt incurred by another insurance company, which had been amalgamated with the first; for the amalgamation was not authorized by the deed of settlement of the company on whose behalf the bill had been accepted, and the holder of the bill was *aware of the nature of the debt for which the bill had been given. *253

Balfour v. Ernest.

This doctrine is based upon the necessity of protecting shareholders against the unauthorized acts of their directors, and ought not to be extended to cases in which persons who are really ignorant of the powers of directors, seek to make them personally responsible for the assumption of powers they did not really possess. The liability of directors in respect of contracts entered into by them beyond their powers will be alluded to hereafter (t); and it will then be seen that although such contracts do not bind the company for which the directors may have acted, it by no means follows that they are not personally liable in respect of them.

Limits of this doctrine.

(r) The difference of opinion on this subject will be seen at once by comparing the judgments in Greenwood's Case, 2 Sm. & G. 95 (reversed on appeal, 3 De G. M. & G. 459); Ernest *v.* Nicholls, 6 H. L. C. 401; Royal British Bank *v.* Turquand, 6 E. & B. 327; Athenæum Life Ass. Society *v.* Pooley, 1 Giff. 102, and 3 De G. & J. 294. See as to Lord Wensleydale's observations in 6 H. L. C. 419; Agar *v.* Athenæum Life Ins. Soc. 3 C. B. N. S. 725: London Dock Co. *v.* Sinnott, 8 E. & B. 347.

(s) 5 C. B. N. S. 601. See, too, Irvine *v.* Union Bank of Australia, 2 App. Ca. 366, as to resolutions which ought to be registered; Peirce *v.* Jersey Waterworks Co. L. R. 5 Ex. 209; *Ex parte* Overend, Gurney & Co. 4 Ch. 460; Eagle Ins. Co.'s Case, 4 K. & J. 549; Athenæum Life Ass. Soc. *v.* Pooley, 1 Giff. 102, and 3 DeG. & J. 294; Sheffield's Case, Johns. 451, and Kearns *v.* Leaf, 1 Hem. & M. 681.

(t) Book ii. ch. 2, § 1.

(*b.*) *Of acts which are intra vires, but irregular.*

Acts *intra vires* but irregular.

Notwithstanding, however, that a company is not bound by those acts of its directors, which the directors have no power to do on behalf of the company, and notwithstanding the tendency to hold that persons dealing with companies are bound to inquire into the powers which are conferred upon the directors, yet, as already stated, there is no obligation on the part of such persons to see that *de facto* directors are properly appointed (*u*), nor to see that directors exercise the powers they possess in the precise manner prescribed by the regulations of the company; and it may be taken as now settled that persons dealing with directors *bonâ fide*, and without notice of an irregular or improper exercise of their powers, are not affected by such irregularity or impropriety.

Royal British Bank *v.* Turquand.

The leading authority on this head is The Royal British Bank *v.* Turquand. (*v*) In that case, a company's deed, registered under 7 & Vict. c. 110, empowered the directors to borrow on the bonds of the company such sums, as by a general resolution of the company might be authorized to be bor-
*254 rowed. The directors gave the bankers of the company a *bond for 1000*l.*, sealed with the seal of the company, and signed by two directors, as a security for what might be due from the company to its bankers on its current account. This was not authorized by any resolution of the company, and it was therefore contended that the bond was invalid. There was no question here as to the form of the bond, or as to the authority of those who issued it to act for the company. The company was *primâ facie* bound by the bond, and no one looking only at the deed of settlement and the bond, could come to a different conclusion. The only question was, whether the bankers were bound to look further and to ascertain whether the issuing of the bond had been authorized by the resolution of a general meeting. It was held both by the Court of Queen's Bench and by the Court of Appeal, that they were not, and that the excess of authority was a matter which concerned only

(*u*) County Life Ass. Co. 5 Ch. 288, where there were some duly appointed directors; Mahony *v.* East Holyford Mining Co. L. R. 7 H. L. 869, where there were none.

(*v*) 5 E. & B. 248, and 6 ib. 327.

the shareholders and the directors.[1] C. J. Jervis, in affirming the decision of the Court below, said: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement; but they are not bound to do more. (*x*) And the party here on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done." (*y*)

This was not the first occasion on which the maxim *omnia præsumuntur rite esse acta* had been applied to such cases. In Clarke *v.* The Imperial Gas Light and Coke Company (*z*), a bond given by the directors of a company under the seal of the company for the payment of an annuity to a retired servant, was presumed to have been executed after due compliance with all conditions; and in Hill *v.* The Manchester and Salford *Water- *255 works Company (*a*), the same principle was acted upon; although that case rather turned on the inadmissibility of the evidence by which it was sought to show that the requisite formalities had not been complied with. In Smith *v.* The Hull Glass Company (*b*), Maule, J., whilst recognizing the doctrine that all persons who contract with the directors of a registered company must be taken to be cognizant of the extent of the authority conferred upon them, added: "But it by no means follows that they are to be taken to be cognizant of all the proceedings of the board of directors;" and that learned judge held, that the public was entitled to assume that a person acting as the agent of a company had been duly appointed by the directors; for by the company's deed of settlement, they had power to appoint persons to carry on its business. Again, in Agar v. The Athenæum Life Assurance Society (*c*), the directors

Omnia præsumuntur rite esse acta.

Clarke *v.* Imperial Gas Company.

Hill *v.* Manchester Waterworks Company.

Smith *v.* Hull Glass Company.

Agar *v.* Athenæum Insurance Society.

[1] See Wells *v.* Wilson, 3 Ohio, 425.

(*x*) See acc. as to by-laws, Royal Bank of India's case, 4 Ch. 252.

(*y*) See as to this Irvine *v.* Union Bank of Australia, 2 App. Ca. 379, where the resolution, if any, would have been registered.

(*z*) 4 B. & Ad. 315.

(*a*) 5 B. & Ad. 866.

(*b*) 11 C. B. 897.

(*c*) 3 C. B. N. S. 725. Compare this with Athenæum Life Ass. Soc. *v.* Pooley, 3 DeG. & J. 294, and 1 Giff. 102.

had power to borrow, but only with the consent of an extraordinary general meeting of shareholders. They did borrow by issuing debentures sealed with the seal of the company, and signed by two of themselves; and it was held that these debentures were binding on the company, although no such authority to borrow had been conferred by a general meeting as was contemplated by the company's deed of settlement. In The Prince of Wales Assurance Society v. The Athenæum Insurance Society (*d*), the Court of Queen's Bench held, that a policy of insurance issued under the seal of an insurance society and signed by three of its directors, was binding upon the society, although the issue of the policy had not been authorized by a previous resolution of directors as required by the company's deed.

Prince of Wales Assurance Society v. Athenæum Insurance Society.

The same principles have frequently been approved and acted upon in chancery. In *Ex parte* the Eagle Company.(*e*) a claim was made against the Athenæum Assurance Society in respect, not of a policy under its seal, but of *256 an *agreement to grant such a policy entered into on behalf of the society by its directors. The Court allowed the claim. The Vice-Chancellor Wood, in delivering judgment, approved of the observations made in the Royal British Bank *v.* Turquand and of the distinction there drawn, between that which upon the face of it is manifestly imperfect when tested by the requirements of the deed of settlement of the company, and that which contains nothing to indicate that those requirements have not been complied with. "Thus, where the deed requires certain instruments to be made under the common seal of the company, every person contracting with the company can see at once whether that requisition is complied with, and he is bound to do so; but where, as in the case I have last referred to, the conditions required by the deed consist of certain internal arrangements of the company; for instance, resolutions at meetings and the like, if the party contracting with the directors finds the acts which they undertake to do, to be within the scope of their power under the deed, he has a right to assume that all such conditions have been complied with. In the case last supposed, he is not bound to inquire whether the resolutions have

Eagle Company's case.

(*d*) 3 C. B. N. S. 756, note. See, too, Prince of Wales Assurance Soc. *v.* Harding, 1 E. B. & E. 183.

(*e*) 4 K. & J. 549. See, too, Anglo-Australian, &c., Ass. Co. *v.* British Provident, &c., Society, 3 Giff. 521, varied on appeal, 4 De G. F. & J. 341.

been duly passed or the like, otherwise he would be bound to go further back and to inquire whether the meetings have been duly summoned and so ascertain a variety of other matters into which, if it were necessary to make such inquiry, it would be impossible for the company to carry on the business for which it is formed."

In Webb *v.* Commissioners of Herne Bay (*f*), a corporation was empowered by statute to issue debentures, but not to members of its governing body. Debentures, however, were issued to one of such members, and were assigned to a *bonâ fide* holder for value without notice of the impropriety in the issue, and it was held that the corporate body was bound by the debentures, and was estopped from denying their validity as against the plaintiff. Webb *v.* Commissioners of Herne Bay.

Again in *Ex parte* Overend, Gurney & Co (*g*), a company was held bound by bills accepted by its chairman, although he had only been authorized to accept them on certain conditions *which had not been complied with. The bill holder in this case had no notice of the conditions, but even if he had had such notice it would have been no part of his business to see that they had been complied with; he would have been entitled to assume that they had. (*h*) *Ex parte* Overend, Gurney & Co. *257

Further illustrations of the same principle afforded by the cases already noticed in which companies have been held bound by the acts of agents irregularly appointed (*i*).

In connection with these cases it is necessary to allude to a decision apparently in direct conflict with them, viz., Peirce *v.* Jersey Waterworks Company (*k*). In this case a company was formed and registered under the Companies' act 1862, with articles which provided in substance that when 3,000 shares had been allotted the members should be associated for the objects of the company and be all bound by its regulations, as if all the shares had been allotted. Before 3,000 shares were alloted the directors appointed the plaintiff to be the engineer of the company; and he sued the company for his salary, and although he had no notice that the 3,000 had not been allotted, he was held not entitled to recover. The court considered that until 3,000 shares Peirce *v.* Jersey Waterworks Company.

(*f*) L. R. 5 Q. B. 642. The corporation in this case was not a trading company.

(*g*) 4 Ch. 460.

(*h*) See *per* L. J. Giffard, ib. 474.

(*i*) *Ante*, pp. 246–248.

(*k*) L. R. 5 Ex. 209.

had been alloted no such company existed as the plaintiff could contract with. But the company unquestionably did exist as a corporate body (*l*); and although the allotment of 3,000 shares may have been a condition precedent to the commencement of the directors' power to bind the company, the cases already alluded to go far to show that the plaintiff was entitled to assume that the condition had been performed. There is, however, a difference between assuming that an agency has commenced and assuming that persons whose agency has commenced are pursuing their authority, and this difference is perhaps sufficient to render the decision in question consistent with those alluded to above (*m*).

Irregularities as affecting members of the company.

The principles established by the foregoing cases apply, not only as between companies on the one hand and strangers on the other, but also between companies and their *258 members; and *it has been held over and over again as will be seen hereafter, that as between one shareholder and the others the validity of the acts of their directors depends in any particular case much more on the power of the directors to do the acts in question, than on the regularity or irregularity of the manner in which those acts may have been done (*n*).

Effect of notice of impropriety.

A person who knows or is to be treated as knowing that directors or agents are acting irregularly and improperly cannot hold the company bound by their acts (*o*); and instruments signed by directors on behalf of a company, in a name which is not that of the company, are improper on the face of them, and do not bind the company (*p*).

In connection with the subject of notice, it must not be forgotten that transferees of bonds and other ordinary choses in action of that kind, not being negotiable instruments, are in no better position than their transferrors (*q*).

(*l*) *Ante*, p. 163.

(*m*) See the end of Mr. Baron Bramwell's judgment.

(*n*) See in book iv. under the head Contributories.

(*o*) See Balfour *v.* Ernest, 5 C. B. N. S. 601; Zulueta's Claim, 5 Ch. 444; Irvine *v.* Union Bank of Australia, 2 App. Ca. 366.

(*p*) Hambro' *v.* Hull, &c., Ins. Co., 3 H. & N. 289.

(*q*) Athenæum Life Ass. Soc. *v.* Pooley, 1 Giff. 102, and 3 De G. & J. 294. The position of transferees of bonds, &c., payable to bearer, will be noticed hereafter.

The observations made above respecting the validity of contracts, &c., entered into by directors in contravention of a company's regulations, have no application to cases in which contracts are required by law to be in a particular form, and that form is not observed. The formalities which must be complied with in order to render contracts binding upon companies will be noticed hereafter (*r*), and it will then be seen that whether these formalities are required by statute or by the common law, contracts not in the form prescribed are altogether invalid, unless they can be upheld on the equitable principles relating to part performance. Formalities required by law.

(*c*). *Of ratification by companies.*

When a contract has been entered into on behalf of a company informally, but has been acted upon and is then disputed by the company, the question naturally arises whether it has not *been ratified, and so become binding.[1] *259 In order to answer this question, regard must be had first of all to the nature of the contract. If it is one by which the company would not have been bound, even if all proper formalities had been observed, ratification by the directors can be of no avail as against the company; nor will ratification by the shareholders amount to a ratification by the company, if the contract in question is one into which the company has no power to enter. (*s*)[2] But if the contract would have been binding on the company, if all proper formalities had been observed, or if all the shareholders had concurred in it, ratification by or on behalf of the company is perfectly possible; and the only question for determination then is, whether the contract has been effectually ratified or not (*t*). The ratification, to be imputable to the company, must be made directly Ratification by companies.

(*r*) *Infra*, § 6.

[1] See the general doctrine of ratification considered at length in Ewell's Evans on Agency, Chap. 7. A few cases touching upon the subject of ratification by partnerships will, for want of a more convenient place, be referred to in this connection.

(*s*) Ashbury Railway Carriage Co. *v.* Riche, L. R. 7 H. L. 653, noticed *ante*, p. 251. See, also, Imp. Bank of China, &c. *v.* Bank of Hindustan, 6 Eq. 91; Phœnix Life Ass. Co. 2 J. & H. 441; The Era Co.'s case, 2 J. & H. 408; 1 De G. J. & S. 29, and 1 Hem. & M. 672.

[2] See Ewell's Evans on Agency, 54, 62.

(*t*) Irvine *v.* Union Bank of Australia, 2 App. Ca. at p. 374, noticed *infra*.

by its shareholders or indirectly through their agents acting within the limits of their real or apparent authority; and in order that ratification by the shareholders or their agents may be proved, it must be shown—

1. That the parties alleged to have ratified the contract knew what it was: or, having their attention drawn to it, did not choose to inquire into it.

2. That they have in some way recognized and adopted it.

If these two essential points are established, there will still remain for consideration the question whether the recognition and adoption have been in proper form. Each of these matters requires a few observations.

1. As to knowledge.

First, as to knowledge.[s] Where the contract is one which it is competent for the directors to make, it is also one which it is competent for them to ratify; and in such a case knowledge by them is for the purpose in question equivalent to knowledge by the company. (*u*) The case of Smith *v.* Hull Glass *Company (*x*) is a leading authority on this head, and has been followed by others which have been already referred to. (*y*) Where, however, the contract is one which it is not competent for the directors to make, ratification by them is of no avail; and knowledge on their part of what is being done under the contract is not equivalent to knowledge on the part of the company. In such a case as this, ratification on the part of the shareholders must be proved, in order to establish ratification by the company. (*z*) But even in this case, it will be inferred as against the shareholders, from comparatively slight circumstances, that they were cognizant of what it was the duty of the directors to bring before them. (*a*)

*260

[s] See, generally, Ewell's Evans on Agency, 61 and notes.

The mere knowledge, on the part of a firm, that one of its members had given a firm note, will not be construed to imply a knowledge on their part that the note was a fraud upon them, and until such knowledge of the fraud has been brought home to them, the firm cannot be held to have ratified the transaction. Hayes *v.* Baxter, 65 Barb. 181.

(*u*) Implied knowledge from the books of the company, but which they never saw, is not enough. See Cartmell's case, 9 Ch. 691.

(*x*) 8 C. B. 668, 11 ib. 897.

(*y*) See *ante*, pp. 247, 248, and Grady's case, 1 De G. J. & Sm. 488.

(*z*) Athenæum Life Assur. Soc. *v.* Pooley. 1 Giff. 102, and 2 DeG. & J. 294. See, also, Smallcombe's case, L. R. 3 H. L. 249; Burges and Stock's case, 2 J. & H. 441.

(*a*) See Lane's case, 1 DeG. J. & S. 504.

As in ordinary cases of agency a principal may ratify his agents' acts whatever they may be, and under all circumstances without inquiring into them, so shareholders who have their attention fairly drawn to what the directors have done may ratify those acts without knowing all the circumstances attending them. Ratification on the part of all the shareholders will be inferred if the acts are such as all can ratify; if the attention of them all, or of such of them as choose to attend, has been fairly called to the acts in question (*b*), and if those acts have been permitted to be done or acted upon for any length of time without being called in question. Although cases exist which are extremely difficult to reconcile with this principle (*c*), the principle itself will be found recognized even in those cases which have been decided not to fall within it. (*c*) Others have been decided in accordance with it. (*d*) A leading case on this subject is The Phosphate of Lime Co. *v.* Green (*e*), in which it was held in effect: 1. That a purchase of shares by the directors of a company out of its funds was beyond the *powers of *261 the directors. 2. That the money paid for them might have been recovered by the company but for the subsequent ratification of the transaction. 3. That the company ought to be treated as having ratified the transaction, as it was fairly brought to the attention of the shareholders (*f*), and had been allowed to pass unquestioned for five years, and had been treated as valid in other arrangements since made by the company.

Knowledge by shareholders not always essential.

Phosphate of Lime Company v. Green.

A ratification of a past irregular act does not of itself authorize a repetition of a similar act; and it may happen that whilst an ordinary meeting of shareholders may suffice to ratify what has been done, a different kind of meeting is required to confer an authority to do the like in future. This is well illustrated by Irvine v. Union Bank of Australia (*g*), in which the directors of a Rice Company were empowered by its articles of association to borrow money to an extent not exceeding

Ratification for past not equivalent to authority for the future.

(*b*) Of course this is essential. See Irvine *v.* Union Bank of Australia, 2 App. Ca. 366.

(*c*) Spackman *v.* Evans, L. R. 3 H. L. 171; Houldsworth *v.* Evans, ib. 263.

(*d*) Smallcombe *v.* Evans, L. R. 3 H. L. 249; Brotherhood's case, 31 Beav. 365, and 8 Jur. N. S. 926, on appeal; and the case next cited.

(*e*) L. R. 7 C. P. 43. See, also, the next case.

(*f*) Opinions might reasonably have differed upon this point, as the allusion to the transaction in question was somewhat misleading.

(*g*) 2 App. Ca. 366.

one half of its paid-up capital. The directors borrowed more than this from a bank, which had notice of the restriction, and that the articles had not been altered by proper authoriy (*h*). The company was held not liable for the sum thus borrowed in excess of the directors' powers, although the shareholders had ratified a similar transaction two years before.

Ratification of directors in case of fraud on the shareholders.

A ratification by the directors is not a ratification by the company where the ratification relates to an act done by the directors in fraud of the shareholders, and the person relying on such ratification was party to the fraud. Therefore, if directors of a company fraudulently issue debentures under the seal of the company to a person privy to the fraud, and the issue of such debentures is entered in the company's books, and interest upon the debentures is regularly paid, but the shareholders are kept in ignorance of the entry and payments, *262 *the company is no more bound by ratification than by the original issue of the debentures. And inasmuch as a debenture is a chose in action, and only confers upon its assignee the title of its assignor, even a *bonâ fide* purchaser for value without notice of any fraud, is in no better position against the company than the original payee; and the purchaser's position against the company is not improved by the recognition of his title by its directors. (*i*)

(*h*) The notice of the restriction was given by the articles of association; an alteration of them could only be made by a registered special resolution. The bank was therefore treated as having had notice as stated in the text. The report does not state that the bank had notice that the limit was in fact exceeded, but the writer assumes that it had.

(*i*) Athenæum Life Ass. Soc. *v.* Pooley, 1 Giff. 102, and 3 DeG. & J. 294. This case was followed in Wood's claim and Brown's claim, 9 W. R. 366, and 10 ib. 662. See, too, Burges and Stock's case, 2 J. & H. 441. Compare Woodhams *v.* Anglo-Australian Co. 3 Giff. 238; The Magdalena Steam Nav. Co. Johns. 690; Hulett's case, 2 J. & H. 306, where the shareholders were not kept in ignorance of what had been done. The Athenæum Life Ass. Society *v.* Pooley appears at first sight to be opposed to Agar *v.* Athenæum Life Ass. Society, 3 C. B. N. S. 725; for in the latter case judgment was recovered in an action at law upon one of a set of debentures, whilst in the former case others of the same set were held invalid. In the action at law, however, the only plea was *non est factum*, and no question of fraud, even if there was any in that case, was raised. But in the suit in equity the debenture was impeached for fraud, and was set aside on that ground.

Secondly, with respect to the mode of recognition and adoption.[1] Assuming a contract to be one which the directors of a company have power to enter into, and that it has been entered into irregularly, and has been acted upon with their knowledge, then, upon the principles already explained, the company ought to be deemed to have ratified the contract in question, and to

2. Mode of recognition.

[1] See, generally, Ewell's Evans on Agency, 62 and notes.

The mere fact that a partner, upon being informed that his co-partner has given a firm note for his individual debt, does not deny his liability thereon, does not, *per se*, amount in point of law to a ratification or adoption of the note, though it may be a circumstance tending to show assent. Reubin *v.* Cohen, 48 Cal. 545.

Where a member of a firm drew a check in the firm name in favor of a bank to which he was individually indebted, and the other members within a month had knowledge of the misapplication of the check to his private account, but omitted to repudiate the act till four years afterward, when the firm brought suit for the money, such omission was *held* to be tantamount to a ratification and to bar recovery. Marine Co. *v.* Carver, 42 Ill. 66.

One partner of a firm, without the knowledge or assent of the other, subscribed for certain stock in the firm name: *Held*, that the omission of the other partner to express his dissent to such subscription, when demand of payment for the stock was made of the firm, did not make him a stockholder or render him liable to pay for stock so subscribed for. Barnard *v.* Lapeer, 6 Mich. 274.

Subsequent ratification of a partner's authority to bind the firm as sureties upon a note, may be proved by circumstantial evidence. First Nat. Bank *v.* Breese, 39 Iowa, 640.

Where one, without authority, purchases goods for persons about to enter into partnership, and in their name and on their credit as partners, and they receive the goods and dispose of them for their own purposes, after being informed that the goods were so purchased, whether they are partners, in fact, or not, they are liable as partners, to the seller for the value of the goods. Pike *v.* Douglass, 28 Ark. 59.

The fact that the other member of the firm, when a note—signed by one partner as an individual, and guaranteed by him in the firm name—was presented for payment, indorsed thereon a waiver of notice, protest, etc., for the purpose of saving expense, cannot be considered a ratification or adoption by the firm of the unauthorized act of the partner in making such guaranty; nor is the failure to make prompt denial of firm liability, on such note being presented for payment, sufficient to establish a ratification or an admission of liability. Marsh *v.* Thompson Natl. Bank, 2 Brad. 217.

J. T., a member of the firm of T. & F., whose business was the laying of wooden pavement, accepted a draft drawn in favor of the plaintiffs, signing his name "J. T. for T. & F." There was evidence that F., the other partner, had been shown the draft, and made offers as to its payment: *Held*, that this was sufficient evidence of a ratification by F. to send the case to the jury; *Held*, further, that evidence tending inferentially to disprove the alleged admission of liability by F. (*e. g.* that the firm received no consideration), was inadmissible. Filbert *v.* Bickel, 7 Wkly. Notes of Cases, 217.

be bound by it, unless some particular form of ratification is required by law, and that form has not been observed. It has been already seen that the non-observance of particular formalities prescribed by companies' deeds of settlement and regulations is immaterial as regards persons dealing *bonâ fide* with the directors without notice of the non-observance of the forms; and several instances have been already referred to in which informal contracts have been held binding on companies on the ground that they have been acted on with the knowledge of the directors. (*k*) A greater difficulty, however, arises where the formalities in question are required to be observed by law as distinguished from agreement between the parties. If informal ratifications of contracts in-
*263 formally entered into were *in such cases held valid, the law requiring the observance of the formalities would be practically repealed. Upon this ground it is that the old rule of the common law that a body corporate can only be bound by instruments under its common seal, has been so rigidly adhered to, even where the corporation has had the benefit of the contract. (*l*) But even here, as will be seen hereafter, the equitable doctrines of part

A partner assented to the signing of the firm name to a proposition for the sale of land, and verbally agreed to be bound by the acts of his partners in carrying it out; they made a contract and signed the firm name in his absence; he signed a deed in pursuance of that contract: *Held*, that if he had not authorized, he had ratified the making of the contract, and was therefore bound by it. Waterman *v.* Dutton, 6 Wis. 265.

A partner said he would settle a note which was signed in the firm name, but which was not given for partnership purposes, "if he could get the books, notes and accounts from" the partner who signed the note: *Held*, that he did not become liable on the note, especially as the condition of this promise never happened. Burleigh *v.* Parton, 21 Tex. 585.

Where a member of a partnership had indorsed his own note with the name of the firm, for his own exclusive benefit, without authority from the other copartner, and the indorsee took the note with full knowledge of the facts: *Held*, that no independent consideration was required to support a subsequent ratification and promise, by the second copartner to pay the note. Commercial Bank *v.* Warren, 15 N. Y. 577.

A promissory note executed by one partner after the dissolution of the partnership, may be ratified by the other partners, and will then be binding upon the firm. Carter *v.* Pomeroy, 30 Ind. 438.

To constitute a ratification by one partner of the use by another partner after dissolution of the firm name, in the renewal of a partnership note, there must be some act on the part of the former fairly implying a willingness to affirm what had been done. Hatton *v.* Stewart, 2 Lea (Tenn.) 233.

(*k*) *Ante*, pp. 247–253.

(*l*) See on this subject, *infra*, § 6.

performance may come into operation and render the contract binding.

Recapitulating the results arrived at in the foregoing pages, it may be taken as settled that,— Recapitulation.

1. Companies can only be bound by the acts of their real or ostensible agents.

2. The agents of a company cannot bind it by any act which the company as a body has no power to do.

3. The agents of a company can bind it by all acts which can be shown to be within the limits of the authority really conferred upon them:

4. And also by acts, which, although not themselves authorized, belong to a class which is; and which acts, therefore, may be authorized for anything that can be learned to the contrary by an examination of the authority conferred.

5. As regards acts of this last description, the neglect of directors to observe the provisions of their company's deed of settlement or regulations is a matter which does not concern a person dealing with them *bonâ fide*, without notice of the non-observance of those provisions.

6. The above rules apply as well to ratifications of contracts previously entered into as to other matters.

7. Where particular formalities are required to be observed by law in order that a contract may be binding, an informal ratification of an informal contract is of no avail except in the limited class of cases to which the equitable doctrines of part performance are applicable.

8. But as regards matters which are not beyond the powers of all the shareholders, they or the company will be held to have ratified what they might have disputed, provided their attention has been fairly called to it, and they have not chosen to question it.

*264 *SECTION III.—LIABILITIES OF PARTNERSHIPS AND COMPANIES IN RESPECT OF ACTS WHICH ARE NEITHER TORTS NOR FRAUDS.

Having seen generally the extent to which one partner is the agent of the firm, and the extent to which directors are the agents of the companies whose affairs are entrusted to them, it is proposed to examine next the power of one partner to bind his firm, and the power of directors to bind their company in particular cases where there is no question of tort or fraud. For the sake of convenience, subjects noticed will be arranged in alphabetical order.

1. *Accounts.*—An account rendered by one partner relative to a partnership transaction is equivalent to an account rendered by the firm. (*m*) [1]

1. Accounts.

The power of one partner to settle accounts, and to assent to a transfer of them, will be found noticed *infra* under the head *Debts.*

2. *Admissions.*—The admissions of one partner with reference to a partnership transaction are evidence against the firm (*n*); [2] but are not necessarily conclusive. (*o*) An

2. Admissions.

(*m*) Fergusson *v.* Fyffe, 8 Cl. & Fin. 121, where an account sent by one partner showing a balance due from the firm, and bearing interest at 9 per cent. was held to be binding on the firm. See as to false accounts, *infra*, § 4.

[1] An account in the handwriting of the ostensible partner, but not shown to have existed while the partnership was in being, is not competent evidence, in a suit against an alleged secret partner, to show to what the business extended. Oakley *v.* Aspinwall, 2 Sandf. 7.

(*n*) Wood *v.* Braddick, 1 Taunt. 104; Pritchard *v.* Draper, 1 R. & M. 191; Nicholls *v.* Dowding, 1 Stark, 81; Sangster *v.* Mazarredo, ib. 162; Thwaites *v.* Richardson, 1 Peake, 23; Grant *v.* Jackson, ib. 268; Wright *v.* Court, 2 Car. & P. 232; and see the last preceding note, and *ante*, p. 94. As to part-owners, see Jaggers *v.* Binnings, 1 Stark. 64.

(*o*) Wickham *v.* Wickham, 2 K. & J. 491, where the point in question was the amount of a debt.

[2] After the fact of a partnership is proved by other evidence, the admissions of one partner may be received to charge the partnership in relation to transactions during its existence. Phillips *v.* Purington, 15 Me. 425; Gulick *v.* Gulick, 14 N. J. L. 578; Goodenough *v.* Duffield, Wright, 455; Wolle *v.* Brown, 1 Whart. 365; Boyce *v.* Watson, 3 J. J. Marsh. 498; Odiome *v.* Maxcy, 15 Mass. 39.

The declarations of a supposed partner, in the absence of the other, are not admissible against the latter until the partnership has been proved *aliunde*. McFadgen *v.* Harrington, 67 N. C. 29;

admission by one person who afterwards enters into partnership with others is no evidence against them, merely because they and

Nixon *v.* Downey, 42 Iowa, 78; Alcott *v.* Strong, 9 Cush. 323.

But where a partnership is alleged to exist between two persons, the acts and declarations of either bind him, but do not affect the other, and it often becomes necessary to prove the acts and delarations of one at a time, and therefore such testimony may properly be admitted, and the legal effect of it postponed until the judge instructs the jury upon the law of the whole case, whose duty it would be to inform them that the acts and declarations of a party, before the partnership is proved, bind himself only. Jennings *v.* Estes, 16 Me. 323.

Where the authority of a partner to speak for his associates is not shown, his statements, so far as concerns them, are mere hearsay. Heffron *v.* Hanaford, 40 Mich. 305.

After *prima facie* evidence of partnership, the declarations of one of the partners is evidence to bind the firm, although made on oath voluntarily by him, under the South Carolina summary process. Allen *v.* Owens, 2 Spears, 170.

In an action against partners jointly, an answer in chancery of one of them may be given in evidence by the plaintiff, after the partnership has been proved, to show admission of the plaintiff's demand; and, in such case, evidence to discredit the answer cannot be offered by the other members of the co-partnership. Hutchins *v.* Childress, 4 Stew. & Port. 34.

Where two mercantile houses do business under their respective names, but the same partners compose both firms, the acknowledgment of one is *prima facie* evidence against the other. Sneed *v.* Kelly, 3 Dana, 538.

Where a *chose in action* against a partnership was assigned, and one of the partners being called upon for payment by the assignee, said he would pay to him if he was legally entitled to receive it: *Held*, that it was sufficient to enable the assignee to maintain an action in his own name against all the partners, on showing a legal assignment. Lang *v.* Fiske, 11 Me. 335.

The "admission" of one partner, that his co-partner is indebted to him, cannot bind such co-partner in a suit by a person claiming through the former. A claim cannot be allowed so to prove itself under the name of an admission. Lewis *v.* Allen, 17 Ga. 300.

Where the vendor of goods, at the time of the sale, professes to sell them to the vendee in his individual capacity, he cannot, in an action against a firm of which the vendee was a member, give in evidence the declarations or admissions of such vendee, that the goods were purchased for the benefit of the firm. Lararus *v.* Long, 3 Ired. L. 39.

The admission of one partner is not sufficient to prove the existence of the co-partnership as against the other partner. Evans *v.* Corriell, 1 G. Greene, 25; Lea *v.* Guice, 21 Miss. 656; Hahn *v.* St. Clair Savings etc. Co. 50 Ill. 456; Degan *v.* Singer, 41 Ill. 28; Gardner *v.* N. W. Mnfg. Co. 52 Ill. 367. See, also, Cowan *v.* Kinney, 33 Ohio St. 422.

In assumpsit against the surviving partners of a firm alleged to have consisted of themselves and a person deceased, where the existence of the partnership was in issue: *Held*, to be error to admit the declarations of such deceased person, made in the absence of the defendants, and not communicated to either of them, the defendants seasonably objecting to such admission, although the jury were instructed that the evidence was not admissible against the defendants, but only to prove that the deceased was a partner, and that

he are partners when the evidence is sought to be used. (*p*) Moreover, in an action against partners, the answer of one of them

such proof was necessary. McLellan *v.* Pennell, 52 Me. 402.

The declarations of a partner not a party to the suit, are not competent evidence of a partnership. Martin *v.* Kaffroth, 16 Serg. & R. 120.

In a suit against A and B as partners, declarations of A that B was not his partner cannot be introduced as evidence to exonerate B. Young *v.* Smith 25 Mo. 341.

The admissions of a partner, made during the partnership, may be introduced as evidence against him in favor of creditors of the partnership, but such admissions are not competent evidence against the creditors of the partnership, for the purpose of diverting the assets of the partnership to the payment of his individual debts. Bond *v.* Nave, 62 Ind. 506.

A partner can only bind a co-partner by his admissions within the scope of the business of the firm. Hahn *v.* St. Clair Savings, etc. Co. *sup.*; Heffron *v.* Hanaford, 40 Mich. 305.

Nor can his admissions bring matters foreign to the partnership, within the scope of the business. Heffron *v.* Hanaford, *sup.*

In a suit against surviving partners to recover the amount of a note given by the deceased partner in his single name, his declarations that the transactions for which the note was given were for the partnership business, and that it was a company note, are not admissible in evidence, if there be no evidence *aliunde* that those transactions were for the partnership. Ostrom *v.* Jacobs, 9 Metc. 454.

Such declarations are admissible against the survivor, the partnership being admitted. Doremus *v.* McCormick, 7 Gill, 49.

In partnership transactions, the acknowledgment of any one concerned in interest may be received in evidence, although the suit may not be in the name of the firm. Fisk *v.* Copeland, 1 Overt. 383.

Declarations of a dormant partner are admissible in evidence against his co-partners, if they relate to the partnership business. Haskaskia Bridge Co. *v.* Shannon, 1 Gilm. 15.

Entries made by one partner during the continuance of the partnership, in a book of accounts, are admissible evidence against both. Walden *v.* Sherburne, 15 Johns. 409.

In a suit against a partnership, if a partner voluntarily submits to be examined on the part of the plaintiff, against himself and his co-partners jointly, his evidence is admissible for that purpose; the rule is the same in contract and in tort. O'Brien *v.* Vantine, 1 Pa. Law Jour. Rep. 79.

The answer of one partner, admitting the indebtedness of the partnership, is sufficient to charge the partnership as garnishees. Anderson *v.* Wanzer, 6 Miss. 587.

Where one of two partners had assigned his interest in the partnership property to his co-partner as collateral security for a debt which he owed him, but was still liable for the debts of the firm, and entitled to his proportion of the surplus property after the debts of the firm, and his debt to his partner, were paid: *Held*, that a paper signed by the partner, who had assigned his interest, and made after the commencement of the suit, stating that, after the

(*p*) Tunley *v.* Evans, 2 Dowl. & L. 747; Catt *v.* Howard, 3 Stark. 3.

to interrogatories cannot be read against the others (*q*), unless they have an opportunity of contradicting it.

*Companies are affected by admissions made by their di- *265

assignment, he had taken the money of the firm, to recover which the action was brought, and had appropriated it to the payment of the note of another firm of which he was a member, in the hands of the defendant, was admissible in evidence against the firm, in an action of assumpsit for money had and received, brought for the benefit of the assignee alone. Foster v. Fifield, 29 Me. 136.

A, being in partnership with B, collected a sum of money in his individual capacity for C, and afterwards executed to the latter a note in the name of the firm for the amount. In a suit against the firm on the note, the plaintiff offered to prove that A, during the existence of the firm, had declared that said money had been used by himself and partner in the business of the partnership: *Held*, that the evidence was inadmissible. Hickman *v.* Reineking, 6 Blackf. 387.

In an action against the surviving member of a firm to recover money lent to the deceased partner, where the defense is that the money was not borrowed or used for firm purposes, declarations of the deceased partner to third persons, made after the money was borrowed, to the effect that it was borrowed and used for firm purposes, are admissible as against the surviving partner. Klock *v.* Beckman, 18 Hun, 502.

If the admissions of a surviving partner with respect to a transaction within the scope of the co-partnership, made after the death of his co-partner, be competent evidence against the personal representatives of the deceased partner, they are not conclusive. McElroy *v.* Ludlam, 32 N. J. Eq. 828.

The declarations of the alleged partners, unaccompanied by acts, and unconnected with any of their declarations proved by the other party, are inadmissible in their own favor. Phillips *v.* Purington, 15 Me. 425.

The acts, declarations, or admissions of one of two partners, are not admissible as evidence for them, in an action against them as a firm, and where they have jointly pleaded the general issue. Hutchins *v.* Childress, 4 Stew. & P. 34.

A entered into partnership with B in the business of tanning, and C bound himself, in a covenant to B, for A's conduct as a partner for a certain time; *Held*, that in an action by B against C on the covenant, the admissions of A, made after the expiration of the stipulated time, were not admissible as evidence against C. Hotchkiss *v.* Lyon, 2 Blackf. 222.

When defendant is sued as surviving partner of a firm, in an action on the case for fraud and deceit in the purchase of a slave, the declarations of his deceased co-partner, by whom the contract was made, before and after the purchase, as to his object in purchasing, are not admissible evidence for the defendant, to show that his co-partner made the purchase on his own individual account, and not on account of the firm. Dixon *v.* Barclay, 22 Ala. 370.

A declaration of a partner, that a liability incurred by a third person, at his request, in borrowing a sum of money, was for the benefit of the firm, does not bind his co-partner. Thorn *v.* Smith, 21 Wend. 365.

(*q*) Parker *v.* Morrell, 2 Ph. 453; Dale *v.* Hamilton, 5 Ha. 393.

rectors or agents in the usual course of business, and relative to matters within the scope of their authority, but not by other admissions. (r)

The acts and declarations of a partner may be given in evidence to prove his assent to the junction of his firm with the firm of a third person; also the conduct of the third person's firm. Wood v. Connell, 2 Whart. 543.

A delaration by a surviving partner that the partnership owed the deceased a certain sum, may be proved, to show that there was an account stated with the deceased in his life-time. Cunningham v. Sublette, 4 Mo. 224.

The admissions or declarations of one partner after dissolution, and not under a new authority, are not evidence against a former partner. Craig v. Alverson, 6 J. J. Marsh. 509; Crumless v. Sturgess, 6 Heisk. 190; Dougelot v. Rawlings, 58 Mo. 75: Tick v. Mulholland, 48 Wisc. 419.

And, on the other hand, partnership transactions with third persons, which took place after the sale of his present interest by one partner to another, and after the retiring partner had ceased to be a member of the firm, are not admissible in evidence against him, upon the question of the value of his interest when sold, nor upon the question of fraud or mistake in the contract of sale, and equally inadmissible are judgments rendered against the new firm, to which the retired member was no party. Dortie v. Dugas, 55 Ga. 484.

Where A and B were partners in trade, and upon their dissolution B assigned, for value, all his interest in the partnership effects to A: *Held*, that B would not be permitted by his mere declaration, made after such assignment, to defeat an action brought in their joint names. Owings v. Low, 5 Gill & J. 134.

In an action of assumpsit by partners, for work and labor: *Held*, that evidence of the statements of one of the partners, made after the dissolution of the partnership, so far as they tended to show a new contract destroying the partnership claim, and giving to each partner a separate demand for his part of the debt, was not admissible; but that the statements of such partner, so far as they showed a payment made to himself, might be proved. Lefavour v. Yandes, 2 Blackf. 240.

The admissions of one partner, made at the time of the payment to him of a debt due to the partners, and at a time subsequent to a dissolution, are admissible against the other partners, as the admissions of an agent relative to an act within the scope of his authority, made at the time when such act was done, are admissible in evidence to bind his principal. Kirk v. Hiatt, 2 Ind. 322.

In Pennsylvania, under the statute of 1838, authorizing one firm to maintain an action against another, although a partner in one is also a partner in the other, the acts and declarations of such common partner, done and made after the dissolution of the partnership, are admissible in evidence in such action. Tassey v. Church, 4 Watts & S. 141.

A was indebted to a partnership on a note. He paid a portion of it to B, one of the members of the firm, which B promised to indorse on the note, but neglected to do so. After the dissolution of the partnership, C, the other

(r) See Bell v. The London and North-Western Rail Co. 15 Beav. 548; Meux's Executor's case, 2 DeG. M. & G. 522.

See further, *infra*, under the heads Debts and Representations.

3. *Agents.*—As to the appointment of agents, see *ante*, p. 246, and *infra* under the head *Servants.*[1] 3. Agents.

4. *Amalgamation.*—As to the power of directors to amalgamate one company with another, see *infra* under the heads *Purchases* and *Sales.* 4. Amalgamation.

5. *Arbitration.*—One partner cannot, without special authority, bind the firm by a submission to arbitration. (*s*)[2] The power to refer disputes, even although they relate to 5. Arbitration.

partner, gave a writing, signed by his individual name, acknowledging that he had retained in his hands the money of A, to the amount due on the note, and promising to refund to A such sum as, in a suit then pending on the note, the court should find had been paid thereon. The money so retained had been received by C, as a member of the partnership, and for their use and benefit. The suit was then withdrawn, and A brought his action against B and C jointly, to recover back the amount first paid to B: *Held*, that the writing given by C to A was admissible in evidence. Story *v.* Barrell, 2 Conn. 665.

After the dissolution of a partnership between an active and a dormant partner, an action for the balance of an account was brought against both, in which the dormant partner pleaded payment, and the active partner was defaulted: *Held*, that an admission made after the dissolution of the partnership by the active partner, that such balance in consequence of a mistake, had not been paid, was competent evidence. Bridge *v.* Gray, 14 Pick. 55.

[1] One partner may appoint an agent by parol to make and indorse bills, etc.; and such power is not void, though given by one partner by writing under seal. Lucas *v.* Bank of Darien, 2 Stew. 280.

(*s*) See Stead *v.* Salt, 3 Bing. 101; Adams *v.* Bankhart, 1 Cr. M. & R. 681; Antram *v.* Chace, 15 East, 209.

[2] Carthaus *v.* Ferrers, 1 Pet. 222; Jones *v.* Bailey, 5 Cal. 345; Wood *v.* Shepherd, 2 Patt. & H. 442; Buchoz *v.* Grandjean, 1 Mich. 367; Martin *v.* Thrasher, 40 Vt. 460.

In Pennsylvania, Kentucky and Illinois, however, one partner may bind his co-partner by submission to arbitration by any agreement not under seal. Taylor *v.* Coryell, 12 Serg. & R. 243; Gay *v.* Waltman, 7 Weekly Notes of Cases, 1879, p. 175; Hallack *v.* Marsh, 25 Ill. 48; Southerland *v.* Steel, 3 Mon. 435; Gay *v.* Waltman, 89 Penn. St. 453.

A reference to third parties of the extent of damage caused by fire, made by one partner without the assent of his co-partners, is binding on him as to his share of the damage. Brink *v.* New Amsterdam, etc. Ins. Co. 5 Robt. 104.

One partner cannot bind another by a sealed bond to perform an award in the name of the firm; the bond is, however, binding upon the party who seals it, and may be declared upon accordingly. Armstrong *v.* Robinson, 5 Gill & J. 412.

Where one partner signed a sealed submission to an award, and accepted the amount awarded in favor of the partnership, pursuant to such submission, and indorsed a receipt in full on the award: *Held*, that it operated either as a release by one partner, or as an award and satisfaction, and was sufficient to bar the partnership claim, though the submission might not have been binding upon his co-partner. Buchanan *v.* Curry, 19 Johns. 137.

dealings with the firm, cannot be said to be necessary for carrying on its business in the ordinary way. (*t*) Where a partnership has been dissolved, and it has been agreed that one of the partners shall get in the debts due to the firm, he has no power after bringing an action in the name of the firm for a debt due to it, to bind his co-partner by a reference of all matters in difference between the plaintiffs and the defendant. (*u*) The partner actually referring the dispute is, however, himself bound by the award. (*x*)

Arbitration by companies.

By the Railway companies arbitration act, 1859 (*y*), railway companies are empowered to refer to arbitration any matters in which they are mutually interested, and which they might lawfully settle by agreement amongst themselves; and by the Companies act, 1862 (*z*), companies governed by that act are also empowered to refer disputes with other companies or persons to arbitration, in accordance with the Railway companies arbitration act, 1859.

Where a company has entered into an agreement which
*266 is **ultra vires*, any agreement to refer disputes arising out of it to arbitration is equally *ultra vires*. (*a*)

[5 *a*. *Assignments*.[1]]

6. *Bills of Exchange and Promissory Notes*.—Any member of

Notice to one of the co-partners, who have separately signed articles of submision to arbitration, is notice to the firm. Haywood *v*. Harmon 17 Ill. 477.

(*t*) Stead *v*. Salt, 3 Bing. 101; Adams *v*. Bankhart, 1 Cr. M. & R. 681; and see Boyd *v*. Emerson, 2 A. & E. 184.

(*u*) Hatton *v*. Boyle, 3 H. & N. 500.

(*x*) Strangford *v*. Green, 2 Mod. 228.

(*y*) 22 & 23 Vict. c. 59.

(*z*) §§ 72 and 73.

(*a*) Maunsell *v*. Midland Great Western Rail Co. 1 Hem. & M. 130.

[1] See *bills and notes, post*.

One partner may transfer or assign a *chose in action*, or a debt due to the partnership, or any other partnership effects, so far as the same can be transferred or assigned in law. Clarke *v*. Hogeman, 13 W. Va. 718; Everit *v*. Strong, 5 Hill, 163; Cullom *v*. Bloodgood, 15 Ala. 34; Harrison *v*. Sterry, 5 Cranch, 289; Anderson *v*. Tompkins, 1 Brock. 456; Mills *v*. Barber, 4 Day, 428; Randolph Bank *v*. Armstrong, 11 Iowa, 515; Fromme *v*. Jones, 13 Iowa, 474; Quiner *v*. Marblehead Ins. Co. 10 Mass. 476; Lamb *v*. Durant, 12 Id. 54; United States Bank *v*. Binney, 5 Mason, 176; Hodges *v*. Harris, 6 Pick. 360; Halsey *v*. Whitney, 4 Mason, 206; Clark *v*. Rives, 33 Mo. 579; Boswell *v*. Green, 25 N. J. L. 390; McClelland *v*. Remsen, 36 Barb. 622; 14 Abb. Pr. 331; S. C. 23 How. Pr. 175.

An assignment by one partner of a debt due to the partnership, to another partner for his benefit individually, is not binding on the other partners. Wood *v*. Shepherd, 2 Patt. & H. 442.

an ordinary trading partnership can bind the firm by drawing, accepting, or indorsing bills of exchange, or by mak- 6. Bills and notes.

A partner cannot, however, sue in his own name to recover property of the firm fraudulently assigned by a co-partner to his individual creditor. Miller *v.* Price, 20 Wis. 117.

When a note payable to a partnership is transferred by one of the partners in payment of his individual debts, the purchaser acquires only the assignor's interest, and holds the note subject in equity to the claim of the other partners. An assignee who purchased the note for cash, after maturity, while it was in the hands of an attorney for collection, and who relied upon the representations of the partner assigning it, as to the state of accounts between his co-partner and himself, and as to his right to dispose of the note, is affected, with notice of the co-partner's interest therein. Halstead *v.* Shepard, 23 Ala. 558.

The assignment of a bond by one of two joint obligees made in the joint name, conveys no title, unless it appear (the obligees being partners) that the assignment relates to a matter within the scope of the partnership business. Hudson *v.* McKenzie, 1 E. D. Smith, 358.

Where an assignment of a partnership claim was made by an agent of the firm with the consent of one of the partners, to apply on a demand against the agent and the consenting partner, it was *held* that the objection that the assignment was invalid for want of the assent of all the partners, only went to the sufficiency of the consideration as between the partnership and the assignees, and could only be raised by the partners themselves. An assignment in the name of a firm cannot be contested by a third person without showing that the partners did not acquiesce in it. Kull *v.* Thompson, 38 Mich. 685.

One partner may, without the knowledge or assent of his co-partner, assign directly to a creditor a part or the whole of the partnership property to pay or secure a firm debt existing or about to be contracted. Mabbett *v.* White, 12 N. Y. 442; McClelland *v.* Remsen, 14 Abb. Pr. 335; S. C. 36 Barb. 622; Mills *v.* Barber, 4 Day, 428; Harrison *v.* Sterry, 5 Cranch, 289; Dana *v.* Lull, 17 Vt. 390; Deming *v.* Colt, 3 Sandf. 290; Anderson *v.* Tompkins, 1 Brock. 461; Hodges *v.* Harris, 6 Pick. 360; Tapley *v.* Butterfield, 1 Metc. 515; Egberts *v.* Woods, 3 Paige, 517; Boswell *v.* Green, 25 N. J. L. 390; Cullum *v.* Bloodgood, 15 Ala. 34; Everet *v.* Strong, 5 Hill, 163; S. C. 7 Hill, 585; McCollough *v.* Sommerville, 8 Leigh, 415; Ormsbee *v.* Davis, 5 R. I. 443; Russel *v.* Leland, 12 Allen, 349.

Where, however, the business of the firm is not trade, buying and selling, but a business to which the continued ownership of the property sold is indispensable, one partner has not authority even to sell the firm property without the knowledge or assent of his co-partner. So *held*, in Sloan *v.* Moore, 37 Pa. St. 217, where authority was denied one partner so to sell a newspaper which he and his co-partner were publishing.

But one partner cannot, without the knowledge or assent of his co-partner, assign the partnership property to a trustee for the benefit of creditors. Deming *v.* Colt, 3 Sandf. 284; Hayes *v.* Heyer, 3 Sandf. 293; Havens *v.* Hussey, 5 Paige, 30; Kirby *v.* Ingersoll, 1 Doug. 477; Dana *v.* Lull, 17 Vt. 390; Fisher *v.* Murray, 1 E. D. Smith, 341; Wetler *v.* Shlieper, 4 E. D. Smith, 707; Stein *v.* Ladow, 13 Minn. 413; Holland *v.* Drake, 29 Ohio St. 441; Hook *v.* Stone, 34 Mo. 329; Pearpont *v.* Graham, 4 Wash. C. C. 234; Hughes *v.* Ellison, 5 Mo. 463; Dickinson *v.* Legare, 1 Dessaus. 537,

ing and indorsing promissory notes in its name. (*b*)[2] And if two partners unknown to each other give two bills in the name

Kimball *v.* Hamilton, 8 Bosw. 495; Ormsbee *v.* Davis, 5 R. I. 442; Dunklin *v.* Kimball, 50 Ala. 251; Brooks *v.* Sullivan, 32 Wis. 444; Hudson *v.* McKenzie, 1 E. D. Smith, 358; Kelly *v.* Baker, 2 Hilt. 531; Haggarty *v.* Granger, 15 How. Pr. 243; Paton *v.* Wright, 15 How. Pr. 481; Pettee *v.* Orser, 18 How. Pr. 442; S. C. 6 Bosw. 123; Welles *v.* March, 30 N. Y. 344; Coope *v.* Bowles, 42 Barb. 88. See, however, Graves *v.* Hall, 32 Tex. 665, and McGregor, 2 Disney, 286.

But while the law implies from the mere partnership relation no power in one partner to make a general assignment for the benefit of creditors, yet a power to make such an assignment may be expressly conferred by one partner upon another, or may, like any other power, be inferred from the conduct of the partners, their manner of doing business, and the circumstances in which they place themselves in reference to the business of the firm. Kirby *v.* Ingersoll, 1 Doug. 490, 491. Its exercise has been upheld by the courts in cases where the non-assenting partners were absent, and could not be consulted, or had made the assignor sole managing partner, or subsequently ratified the assignment. See Anderson *v.* Tompkins, 1 Brock. 456; Stein *v.* Ladow, 13 Minn. 412; Robinson *v.* Crowder, 4 McCord, 519; Deckard *v.* Case, 5 Watts, 22; Harrison *v.* Sterry, 5 Cranch, 300; McCollough *v.* Sommerville, 8 Leigh, 433, 436; Robinson *v.* McIntosh, 3 E. D. Smith, 221; Fisher *v.* Murray, 1 E. D. Smith, 341; Kemp *v.* Camley, 3 Duer, 1; McNutt *v.* Strayhorn, 39 Pa. St. 269; Clark *v.* Wilson, 19 Pa. St. 414; Bank *v.* Sackett, 2 Daly, 395; Roberts *v.* Shepard, 2 Daly, 110; Brooks *v.* Sullivan, 32 Wis. 444; Corwin *v.* Suydam, 24 Ohio St. 209; Hewes *v.* Bayley, 20 Pick. 96; Clark *v.* McClelland, 2 Grant's Cases, 31; Baldwin *v.* Tynes, 19 Abb. Pr. 32; Kelly *v.* Baker, 2 Hilt. 531; Forbes *v.* Scannel, 13 Cal. 243; Robinson *v.* Gregory, 29 Barb. 560; Palmer *v.* Myers, 43 Barb. 509; Bank *v.* Sackett, 2 Abb. Pr. N. S. 286; Hitchcock *v.* St. John, 1 Hoffm. 511; Hennessey *v.* Bank, 6 Watts & S. 300; Sheldon *v.* Smith, 28 Barb. 593; Welles *v.* March, 30 N. Y. 344; Palmer *v.* Myers, 29 How. Pr. 8. But see Pettee *v.* Orser, 6 Bosw. 123, in which absence of the partners not assenting was held to create no emergency which justified the assignment in that case; and see Coope *v.* Bowles, 42 Barb. 88.

Before the adoption of the Revised Statutes, an assignment, by the surviving partner, of all the partnership funds, for the benefit of the assignees, who were creditors, and one of whom was administrator of the deceased partner, was *held* valid. Hutchinson *v.* Smith, 7 Paige, 26.

A general assignment of the property of the firm, for the benefit of a portion of the firm creditors, made by one partner against the opposition of the other partner, of which the beneficiaries under such assignment, or their agent procuring it, have notice prior to its execution, is invalid. Bull *v.* Harris, 18 B. Mon. 195.

The law will not favor an attempt by one partner to give a preference to particular creditors against the wish of his co-partners. Matter of Lowenstein, 7 How. Pr. 100.

An assignment by a partner of his separate property, in trust for the payment of the partnership debts, is valid as against a separate creditor of such partner. Newman *v.* Bagley, 16 Pick. 570.

[2] One of several partners has an im-

(*b*) See *Re Riches*, 5 N. R. 287; Pinckney *v.* Hall, 1 Salk. 126; Dickin-

of the firm in payment of the same demand, the firm will be liable on both bills, if held by a *bonâ fide* holder for value. (*c*)

plied authority to execute promissory notes in the name of the firm, where such authority is necessary to the successful carrying on of the business of the firm; or 2, according to the usage of similar partnerships; or 3, according to the course of trade of that particular partnership. Gray *v.* Ward, 18 Ill. 32; Storer *v.* Hinkley, Kirby, 147; Newell *v.* Smith. 23 Ga. 170; Dow *v.* Phillips; 24 Ill. 249; Miller *v.* Hughes, 1 A. K. Marsh. 181; Waldo Bank *v.* Lumbert, 16 Me. 416; Coursey *v.* Baker, 7 Har. & J. 28; Bascom *v.* Young, 7 Mo. 1; Potter *v.* Dillon, 7 Mo. 228; Partin *v.* Leiterloh, 6 Jones' Eq. 341; Kirkpatrick *v.* Turnbull, Add. 259.

Each partner is the agent of the other to sign the partnership name to notes given within the scope of the partnership business, but not to sign the firm name to notes relating to business outside of the scope of the partnership. Zuel *v.* Bowen, 78 Ill. 234; Blodgett *v.* Weed, 119 Mass. 215; Nat. Union Bank *v.* London, 66 Barb. 189; Ditts *v.* Lonsdale, 49 Ind. 521.

Stipulations between the partners restricting the power of signing the firm name to negotiable paper to one or more of their number, will not affect third parties without notice. Laler *v.* Jordan, 44 Miss. 283; Sylverstein *v.* Atkinson, 45 id. 81; Nat. Union Bank *v.* London, 66 Barb. 189.

So, a firm is bound by the indorsement by a partner to a *bona fide* purchaser for value, of a bill of exchange payable to the partnership; although, as between the partners, it was his sole property, and they had agreed that no member should indorse paper to make the others liable. Barrett *v.* Russell, 45 Vt. 43.

Where A, being indebted, forms a partnership with B, who assumes half of the indebtedness of A, and succeeds to half of the property of A in the business, and they afterwards, as partners, execute a note to a creditor of A for A's debt, and B then sells his interest in the firm to C, who succeeds as to all the rights and liabilities of B in the firm, and A then sells his interest in the firm to D, who succeeds to all his rights and liabilities in the firm of A & C, C and D taking the place of A and B, the note of A & B will be held a firm indebtedness as to the new firm of C & D, and either one of such firm will be authorized to give a firm note in place of the note given by A & B. Silverman *v.* Chase, 90 Ill. 37.

If a firm is engaged to any extent in making collections, even though that may not be the principal business of the partnership, one of the partners may bind the firm by a promissory note given for a balance of money collected by it. Van Brunt *v.* Mather. 48 Iowa, 503.

Where an application was made to an insurance company, through a broker, for insurance, on account of a firm of merchants, on a ship, the loss, if any, payable to the firm, and the company upon the receipt of the firm's note, signed in the name of the firm by one of the partners, issued a policy upon the ship as the property of the firm: *Held*, that the company were not put upon inquiry as to whether or not the firm owned the ship, or whether or not the insurance was a firm transaction, and that the note bound all the part-

son *v.* Valpy, 10 B. & C. 128; Sutton *v.* Gregory, 2 Peake, 150; Smith *v.* Bailey, 11 Mod. 401; Lewis *v.* Reilly, 1 Q. B. 349; Stephens *v.* Reynolds, 5 H. & N. 513.

(*c*) Davison *v.* Robertson, 3 Dow. 218.

Joint and several notes.

One partner, however, has no implied power to bind his co-partners, otherwise than jointly with himself; consequently a joint and several promissory note signed by one

ners, whether part owners of the ship or not. Osgood *v.* Glover, 7 Daly, 367.

Where a partner in the ordinary course of business insures property represented to the insurer to belong to the firm, and gives in payment of the premium the firm's promissory note, the other partners are liable on the note, even though the note was given without their consent or knowledge, and in violation of the co-partnership articles, if there was nothing in the nature of the transaction notifying the insurer of the latter facts. Osgood *v.* Glover, 7 Daly, 376.

In an action on a note against several co-partners, it is no defense for one of them that he executed the note in the co-partnership name after the suit was instituted, and ante-dated it, with a view to secure to the plaintiff, in preference to other creditors, the property attached, without the knowledge of the others. Barber *v.* Minturn, 1 Day, 136.

An acting partner may, for the benefit of his firm, and in order to raise money, use the name of the firm, by accepting a bill of exchange, to be exchanged for the acceptance of another firm. Gano *v.* Samuel, 14 Ohio, 592.

Partnership articles of S. & Co. stipulated that S. "in his capacity of financier of the concern, shall provide for funds to carry on the business, and use his own judgment in obtaining them. He shall, however, be obliged to use his individual name alone for the purpose of procuring money, by notes or otherwise, and shall thus be individually liable for all the debts contracted in such manner, and likewise be individually responsible for all losses which may occur in consequence of such indorsements:" *Held*, that S. was not thereby authorized to bind the firm by notes drawn in his own name, or to involve them, as to money borrowed, except when actually embarked in its affairs. Dreyer *v.* Sander, 48 Mo. 400.

A note or bill made by one partner in the name of the firm, will be presumed to have been made in the course of partnership dealings, and for a partnership purpose, and the burden of proof is upon him who seeks to impeach it to show the contrary, and that such fact was within the knowledge of the payee. Gregg *v.* Fisher, 3 Brad. (Ill.) 261; Carrier *v.* Cameron, 31 Mich. 373; Hamilton *v.* Summers, 12 B. Mon. 11; Magill *v.* Merrie, 5 B. Mon. 168; Laler *v.* Jordan, 44 Miss. 283; Sylverstein *v.* Atkinson, 45 Miss. 81; Waldo Bank *v.* Greeley, 16 Me. 419; Vallett *v.* Parker, 6 Wend. 615; Thurston *v.* Lloyd, 4 Md. 283; Knapp *v.* McBride, 7 Ala. 19; Barrett *v.* Swann, 17 Me. 180; Eusminger *v.* Marvin, 5 Blackf. 210; Littell *v.* Fitch, 11 Mich. 525; Hogg *v.* Orgill, 34 Pa. St. 344; Whittaker *v.* Brown, 16 Wend. 505; Miller *v.* Hines, 15 Geo. 197; Nat. Union Bank *v.* London, 66 Barb. 189; Davis *v.* Cook, 14 Nev. 265. See, also, Abpt *v.* Miller, 5 Jones' L. 32.

And the rule is the same in the case of an indorsement: Manning *v.* Hayes, 6 Md. 5.

Each partner has the same right to raise money for the use of the firm by indorsement of negotiable paper, as to do so by means of paper already issued. The public would not be affected by any private restriction on the power of each partner. Moorehead *v.* Gilmore, 77 Pa. St. 118. See, also, Manhattan Co. *v.* Ledyard, 1 Cai. 191.

A partner is not, however, an agent for his co-partner, to indorse other than

partner for himself and co-partners, does not bind them severally (*d*); but it does bind them and him jointly (*e*) and himself separately. (*f*)[s]

partnership paper. Bowman *v.* Cecil Bank, 3 Grant, Cas. 33.

The assent of a partner to the indorsement, by his co-partner, of a note given out of the course of the partnership business, must be proved, not presumed. Morcein *v.* Andrews. 10 Wend. 461.

Where the paper of a firm is given by one member on business not pertaining to the partnership, it is presumptive evidence of want of authority; and if the person to whom the paper is passed knows the fact at the time, he is chargeable with notice of want of authority. Sometimes the face of the contract is notice to the holder; and sometimes the authority of one person to bind the firm may be established from facts and circumstances. Miller *v.* Hines, 15 Ga. 197. See, also, Osgood *v.* Glover, 7 Daly, 367; *post*, 329, note; Chazournes *v.* Edwards, 3 Pick. 5; Union, etc., Bank *v.* Underhill, 10 N. Y. W'kly Dig. 106.

In the case of St. Nicholas Bank *v.* Savery, the following propositions were laid down, and their legal conclusions held. The 1st and 2nd were held to be in full accord with the general rule applicable to individual indorsers, and the 3rd was founded on the law merchant:

1. When a party takes negotiable paper made, accepted, or indorsed by one of several partners, in or with the partnership name, and the fact that such name was not signed or indorsed in the regular course of the business of the firm is apparent on the face of the instrument, or necessarily implied in the nature of the transaction, such party cannot, though he may have parted with value on the faith of the paper, charge the other members of the firm, except upon proof that they assented to the transaction. In every such case he is chargeable as matter of law, with notice of want of authority in the individual partner to bind the firm without their express assent.

2. When the fact, though existing, that such name was not signed or indorsed in the regular course of the business of the firm, is not apparent from the face of the instrument, and the nature of the transaction appears to be susceptible of different conclusions, the question of notice is one of fact, to be determined by the jury upon all the circumstances. In every such case, the burden is again upon the plaintiff, though he may have parted with value, to satisfy the jury, either that the circumstances of the case did not constitute notice to him, or that if they did, the other members of the firm assented to the transaction.

3. When the fact, though existing, that such name was not signed or indorsed in the course of the regular business of the firm, is not apparent

(*d*) See Perring *v.* Home. 4 Bing. 32; 2 Car. & P. 401.

(*e*) Maclae *v.* Sutherland, 3 E. & B. 1.

(*f*) See Elliot *v.* Davis, 2 Bos. & P. 338; Gillow *v.* Lillie, 1 Bing. N. C. 695.

[s] Each member of a firm has the implied right and power to make bills to raise money to carry on the business, and in making such bills, whether the style of the firm or some other style is used, it does not change the legal rights of creditors nor the legal responsibility of each of the partners. Bacon *v.* Hutchings, 5 Bush, 595. See, also, Kinsman *v.* Dallom, 5 T. B. Mon. 382.

Upon the formation of a partnership, until a firm name is adopted, the presumption must be that in the transaction

Powers of attorney to draw bills, &c.

In consequence of the doctrine that every member of an ordinary trading partnership has authority to draw, accept, and indorse bills in its name, if a member of such a part-

from the face of the instrument, and the nature of the transaction appears to have been of such a character as to give the plaintiff a right to suppose that it was a partnership transaction, the members contesting their liability must not only show that in fact it did not constitute such a transaction, but also that the plaintiff had in some way actual notice thereof. In every such case the burden is shifted on the defendant to establish such notice. St. Nicholas Bank *v.* Savery, 13 Jones & S. 97; S. C. Abb. Yr. Book, 1880. 329.

Where a partnership is limited by articles to a particular business, if one partner make a note in the partnership name for other than such business, it lies with the person suing the note to show an assent, express or implied, on the part of the other partners to the transaction; a disclaimer of it, to any other than the party to whom the note was given, cannot be shown in evidence. Waller *v.* Keyes, 6 Vt. 257.

Where A, B and C were partners, doing business in New York, where A resided, and in F, in Virginia, where B and C resided, and A indorsed a note in New York, in the partnership name, without the consent or knowledge of B and C, as the mere surety of D, for a debt previously due from D to the indorsee, the partnership having no interest in the transaction: *Held*, in an action by the indorsee against all the partners, as indorsers, that the plaintiff could not recover, although the jury should find that he had no knowledge, express or implied, of A's want of authority. New York Fire Ins. Co. *v.* Bennett, 5 Conn. 574.

M. and J. were partners in the storage busines. M., the managing partner, gave a firm note for the value of grain, which he had received and receipted for in the firm name, and which had since been lost or converted. Accounts in the transaction, kept by M. in his own name, and letters showing that he had separate dealings with the payee, were *held* not sufficient evidence to relieve J. from liability on the note as an obligation of the firm; the *onus* to prove it not to be such an obligation resting upon J. Pierce *v.* Jackson, 21 Cal. 636.

Where a promissory note is executed by a member of a partnership, in the name of the firm, and with the firm signature, and there is nothing to show that the note was not executed by the firm, except a want of knowledge, on the part of a book-keeper of the firm, of the due execution of the note, and of the consideration therefor, and nothing to show under what circumstances, or upon what consideration, the holder of the note received it, it will be presumed that the note was duly executed by the firm. Adams *v.* Ruggles, 17 Kan. 237.

---

of the firm business each member is the agent of the others to transact the business, even to the signing of the names of the several members of the firm to promissory notes executed in the legitimate business of the firm. Kitner v. Whitlock, 88 Ill. 513. See, also, Holden *v.* Bloxum, 35 Miss. 381; Nelson *v.* Neely, 63 Ind. 195.

A note payable to partners in their individual names, and assigned by one of the partners in the name of the firm, may be given in evidence by the assignee in a suit against the maker, without proof of the authority of the partner who assigned it, although "non-assignment" is pleaded. Mick *v.* Howard, 1 Ind. 250.

nership goes abroad and gives his co-partner a power of attorney to manage his affairs, and draw, accept, or indorse bills in his name, this authority warrants the attorney in putting his principal's name

A, the second indorser of a promissory note made by B, payable to his own order and by him indorsed, procured it to be discounted by a bank, and at the same time and, as part of the same transaction, delivered to the bank as collateral security for the note then discounted, a note payable to A, signed in the firm name of a partnership by one of the partners without the knowledge and in fraud of the firm, and given to A as security for the note of B, which had been previously obtained by A from the firm, and had been passed by him to C, the president of the bank, as security for a loan from C, and was in possession of the latter at the time it was discounted. On the back of the note of the firm at the time it was delivered to the bank, was a memorandum signed by A, stating that the note was held by him as security for the note of B. Both notes were dated on the same day, were for the same amount, and were payable at the same time. The bank had no knowledge of the dealings between A and the firm: *Held*, in an action by the bank against the firm on the note of the latter, that the bank was charged with notice that the note in suit was given as security only for the payment of the note of B; and that the action could not be maintained against all the members of the firm, without proof that the note was given with their consent, or in the regular course of the partnership business security. Bank *v.* McDonald, 127 Mass. 82.

L., a member of the firm of S. & Sons, and also of the firm of P. & Co., made in his own name two promissory notes, payable to the order of the latter firm, and indorsed the name of the firm of S. & Sons upon them in fraud of that firm. D., a member of the firm of P. & Co., indorsed the name of his firm upon the notes as first indorsers. Both notes were presented to a bank before maturity for discount, the one by a broker, and the other by D., who was known by the officers of the bank to be a member of the firm of P. & Co. The bank discounted both notes: *Held*, in an action upon the notes by the bank against S. & Sons, as second indorsers, that neither the form of the notes, nor the fact that one was presented by a broker, nor the fact that the other was presented by D., was conclusive notice to the bank, as a matter of law, of the invalidity of the indorsements. Atlas National Bank *v.* Savery, 127 Mass. 75.

Since the St. of 1874, c. 404, if one partner signs, as maker, a promissory note in his individual name, payable to a third person, and in fraud of his partners, signs the firm name on the back of the note, above the name of the payee, a person who buys the note before maturity has notice from the form of the note of the conditional liability of the

---

A note signed by two partners with their individual names, is sufficient to bind the firm. Maynard *v.* Fellows, 43 N. H. 255. See the form of the contract considered, *post*, 337 *et seq.*

One partner may legally authorize a clerk of the firm to accept bills, and sign and indorse notes, in the name of the company. Tillier *v.* Whitehead, 1 Dall. 269.

Any partner in a firm may be the agent of a third person, in drawing bills in favor of the firm, for advances made to such third person, under an express authority. Baring *v.* Lyman, 1 Story, 396.

to non-partnership bills only; his authority to put the partnership name to partnership bills being independent of, and unaffected by, the letter of attorney. (*g*)

other members of the firm and cannot maintain an action against them upon the note. National Bank of Commonwealth *v.* Law, 127 Mass. 72.

An individual acceptance of an order on two firms, to pay what might be in their hands, or in the hands of any partner, by a partner of both, intrusted with the settlement of all accounts with the drawer, is presumed to be upon consideration of having the funds under his control, and is therefore valid. Prentiss *v.* Foster, 28 Vt. 742.

An acceptance of an order by one member of a firm will not bind the company, where there is no allegation that the defendants were partners, unless the partnership be proved. Meachen *v.* Batchelder, 3 Chand. 316.

A note in common form, signed by an individual in whose name a partnership is carried on, and who at the same time openly transacts business on his own account, does not, *primâ facie*, bind his co-partners. Manufacturers', etc., Bank *v.* Winship, 5 Pick. 11; Yorkshire Bank *v.* Beatson, 22 Alb. Law Jour. 9.

But where the name of the individual and of the firm is the same, and the individual carries on no business apart from the firm, the presumption, in the absence of evidence to the contrary, is that a bill bearing such a name is the bill of the firm. There is no difference in this respect between a dormant and an ostensible partner. Yorkshire Bank Co. *v.* Beatson, *supra*.

To support an action against two as acceptors of a draft in their partnership name, the plaintiff must prove the partnership, and that one, at least, of the defendants accepted the draft. Head *v.* Sleeper, 20 Me. 314.

A promissory note made by one of two members of a firm in the firm name is valid against the firm in the hands of a *bonâ fide* holder for value, although not made in the partnership business, and although the other partners did not consent to and did not know of the making of the note. The note is presumptive evidence that it is valid business paper, and was given for a debt due from the makers to the payee. First National Bank *v.* Morgan, 73 N. Y. 593; Duncan v. Clark, 2 Rich. 587; Haldeman *v.* Bank of Middletown, 28 Pa. St. 440; Collier *v.* Cross, 20 Ga. 1; Rich *v.* Davis, 4 Cal. 22; S. C. 6 Cal. 141; Hawes *v.* Dunton, 1 Bailey, 146; Marsh *v.* Thompson Nat. Bank, 2 Brad. (Ill.) 217; Boardman *v.* Gore, 15 Mass. 331; Walworth *v.* Henderson, 9 La. Ann. 339; Roth *v.* Colvin, 32 Vt. 125.

The rule is the same as to an accommodation note or indorsement. First Nat. Bank *v.* Morgan, *supra;* Austin *v.* Vandermark, 4 Hill, 259; Maudlin *v.* Branch Bank, 2 Ala. 502; Stall *v.* Catskill Bank, 18 Wend. 466; Wells *v.* Evans, 20 Id. 251; S. C. 22 Id. 324; Bank of St. Albans *v.* Gilliland, 23 Id. 311; Emerson *v.* Harmon, 14 Me. 271; Catskill Bank *v.* State, 15 Id. 364; Gildersleeve *v.* Mahony, 5 Duer, 383; Whaley *v.* Moody, 2 Humph. 495. See, also, Pooley *v.* Whitmore, 10 Heisk. 629.

Where one partner indorses a note in the name of the firm, for the accommodation of a third person, without express authority from his co-partners, they will not be bound thereby as against the partner indorsing the note; and the latter having paid the note, a judgment on the note recovered by an innocent holder

(*g*) Attwood *v.* Munnings, 7 B & C. 278.

With respect to partnerships which are not trading partnerships, the question, whether one partner has any implied authority to bind his co-partners by putting the name of

Bills, &c., of non-trading partnerships.

against all the members of the firm, is not evidence to charge such co-partners with contribution. Berryhill *v.* McKee, 1 Humph. 31.

A security given by one partner, in the name of the partnership, for a debt known by the person taking the security to be his individual debt, and without the consent of the other partners, is not binding upon the partnership. Livingston *v.* Roosevelt, 4 Johns. 251; Poindexter *v.* Waddy, 6 Munf. 418.

A partnership was established composed of the members of an old firm and others, and did business under different firm names, at Tuscaloosa, Mobile, and New York. The new partnership was indebted to the old. A member of the old firm drew a bill in the name of the firm at Mobile, in payment of a debt of the old firm, on the house at New York, which was accepted in the firm name by a member of the old firm: *Held*, that this was like the payment of any other indebtedness of the partnership, and not like one partner giving a partnership note for his individual debt. Hester *v.* Lumpkin, 4 Ala. 509.

If a partner give a negotiable note, in the name of the partnership, for his own private debt, a *bonâ fide* indorsee of the note, who had no notice of the purpose for which it was given, may recover the amount of the co-partnership. Munroe *v.* Cooper, 5 Pick. 412; Chazournes *v.* Edwards, 3 Id. 5; Livingston *v.* Roosevelt, 4 Johns. 251; Mechanics' Bank, etc. *v.* Foster, 19 Abb. Pr. 47; S. C. 29 How. Pr. 408.

So, all the partners are liable on a note indorsed in the name of the firm who are the payees to a *bonâ fide* indorser, although the firm's name be used by one of the partners without authority. State, etc. Bank *v.* Thompson, 42 N. H. 369.

Where a partner makes a note in the name of his firm, without the knowledge or consent of his partner, and not in the course of partnership business, one seeking, as indorsee, to recover the amount of the note against the other partner, must show that he took it before maturity, for value and in good faith, and mere proof that the note "was passed to the plaintiff for goods sold," is not sufficient. Clark *v.* Dearborn, 6 Duer 309.

A and B being partners in trade with S and others, A made a promissory note, in the name of the firm, payable to B, to secure an alleged balance due from the firm to B, without the knowledge or consent of S. B indorsed the note to a third person: *Held*, that, though no action would have lain by B, yet the indorsees might bring an action against the firm as makers. Smith *v.* Lusher, 5 Cow. 688.

A partnership note was made, after the dissolution of a firm, by one of the partners, accepted by the payee with knowledge of the fact, and transferred by him in payment of an antecedent debt, under an agreement that, if the note could not be collected, he would be liable for a part of the original debt: *Held*, that the assignee was not a *bonâ fide* holder in that sense which would enable him to maintain a suit on the note against the partners. Bristol *v.* Sprague, 8 Wend. 423.

Indorsers of a note made in the name of a firm, by a member thereof, without the assent of his co-partner, and passed by him for his individual debt, are not liable for its payment to a holder with notice. Williams *v.* Walbridge, 3

the firm to a negotiable instrument, depends upon the *267 nature of *the business of the partnership. (*h*)[1] In the absence of evidence showing necessity or usage, the power

Wend. 415. See, also, Chazournes *v.* Edwards, 3 Pick. 5; Livingston *v.* Hastie, 2 Cai. 246; Hagar *v.* Mounts, 3 Blackf. 261. See, however, Bowen *v.* Mead, 1 Mich. 432.

A was a member of two firms; he wrote a note to himself, signed the name of one firm, indorsed it by his own name, and by the name of the other firm: *Held*, that these facts were not such as required a holder for value before maturity to prove that the partners assented to the indorsement, or that the proceeds were used for their benfit. Ihmsen *v.* Negley, 25 Pa. St. 297.

There were three successive partnerships; the first composed of two persons, A and B, and styled A & B; the second of three persons, A, B, and C, and styled A, B & Co.; the third of two persons, A and B, and styled A & B. But A, in the third firm, was not the same person, but had the same name as A in the first and second firms. B was in all the three firms. B gave a note, by the name of the first and third firms, A & B: *Held*, that the note was *prima facie* the note of the firm existing when the note was given, and so not binding on A of the first firm; but if it was in fact given on account of the first firm, to a customer, without notice, A of the first firm would be bound; and the court remanded the cause to be tried again. Pomeroy *v.* Coons, 20 Mo. 598.

An affidavit of defense to an action on a firm note, given by a partner for borrowed money, which avers no facts that ought to have put the plaintiff on inquiry as to whether the money was for the individual use of such partner is fatally defective, and the firm is liable. Potter *v.* Price, 3 Pittsb. 136.

The rule, that a note given by one partner in the partnership name for his individual debt, is good against the firm in the hands of a *bonâ fide* holder, applies only to notes of mercantile partnerships, and does not apply to those of partnerships for keeping tavern. Cocke *v.* Branch Bank, 3 Ala. 175.

If one of two partners indorse a note in the name of the firm as an accommodation for a third person, without the authority or consent of his partner, the latter is not bound by such indorsement as to a person who takes the note with notice that the indorsement was made in the character of surety; and the burden of proving the authority or consent of the co-partner, in such a case, rests on the person holding the note. Hendrie *v.* Berkowitz, 37 Cal. 113; Darling *v.* March, 22 Me. 184; Lang *v.* Waring, 17 Ala. 145; Chenowith *v.* Chamberlin, 6 B. Mon. 60; Laverty *v.* Burr, 1 Wend. 529; Mechanics' Bank *v.* Livingston, 33 Barb. 458; Tutt *v.* Addams, 24 Mo. 186; Heffron *v.* Hanaford, 40 Mich. 305.

See, however, Flemming *v.* Prescott, 3 Rich. 307; Freeman *v.* Ross, 15 Ga. 252.

The fact that such a note is found by a third person, in the hands of the maker, is notice to such third person that the firm indorsement was for the accommodation of the maker. Hendrie *v.* Berkowitz, 37 Cal. 113.

An indorsement by a partner of his separate accommodation note, with the name of his firm, is a sufficient indication of the nature of the transaction, to make it the duty of the bank which discounts it, to inquire into his authority to use the firm name for the occasion, unless

(*h*) See Dickinson *v.* Valpy, 10 B. & C. 128.

[1] One partner in a non-trading partnership cannot bind his co-partner by a

has been denied to one of several mining adventurers (*i*), quarry workers (*k*), farmers (*l*), solicitors (*m*). Where two firms agreed

there are circumstances from which the authority can be implied. Tanner *v.* Hall, 1 Pa. St. 417.

A and B were partners. A was the active partner, and B was in the habit of frequenting the store, but not managing the business. A was accustomed to indorse the partnership name as sureties for third persons, and notices of the coming due of such liabilities were often left at the store, but it was not proved that they were ever brought to the knowledge of B, except in one instance, when he denied A's authority so to use the name of the firm: *Held*, that the facts were not sufficient to charge B in an action on one of such notes. Andrews *v.* Planters' Bank, 15 Miss. 192.

A note was given by a debtor to an execution creditor to obtain a release from a levy, and was indorsed in the name of a firm by one of the partners. There was no showing that the firm received any consideration, or that one of the partners consented to the indorsement: *Held*, that it must be presumed that it was merely an accommodation indorsement, and that the creditor, who of course was not a *bonâ fide* holder, was privy to all the facts. Heffron *v.* Hanaford, 40 Mich. 305.

A partnership note continues binding on the firm, although renewed with the signature of one partner only, when no change in the liabilities of the parties is intended. Horsey *v.* Heath, 5 Ohio, 358.

A member of a firm may renew a note originally given for money to be applied to his individual uses, but which was signed with the firm name, by his only partner, with the understanding that the loan was made on the credit of the firm. Tilford *v.* Ramsey, 37 Mo. 563.

In an action against A on a promissory note executed by B, in the name of himself and A, in renewal of a prior joint note executed by them, the court instructed the jury, that if from the evidence they believed that A & B had been carrying the note alleged to have been renewed, and that A had informed the payee's agent that if it became necessary to renew the note, B had authority to execute the renewal in the name of both A and B, and that the note in suit had been so executed prior to any revocation of such authority, A was bound thereby: *Held*, on evidence tending to show such a state of facts, that the instruction was correct. Pate *v.* First National Bank, 63 Ind. 255.

Where the note was given in renewal of another made by the same partner who signed the last, which itself was in renewal of a note by a different firm of which the signer had been a member, upon a plea of *non est factum* by the co-partner, the *onus* of showing authority to sign is on the plaintiff. Bryan *v.* Tooke, 60 Ga. 437.

A renewal note given in the firm name after dissolution, by a partner without his co-partner's assent, and bearing a higher rate of interest than the note renewed, may be regarded as divisible and held valid to the extent of the old note at the old rate of interest, and invalid as to the excess of interest. Wilson *v.* Forder, 20 Ohio St. 89.

(*i*) Brown *v.* Byers, 16 M. & W. 252; Dickinson *v.* Valpy, 10 B. & C. 128. Compare Brown *v.* Kidger, 3 H. & N. 853.

(*k*) Thicknesse *v.* Bromilow, 2 Cr & J 425.

(*l*) Greenslade *v.* Dower, 7 B & C. 635.

(*m*) Hedley *v.* Bainbridge, 3 Q. B. 315; Levy *v.* Pyne, Car. & Marsh. 453; Harman *v.* Johnson, 2 E. & B. 61, and 3 Car. & Kir. 272.

---

bill or note, drawn, accepted, or indorsed by him in the firm name, even though it be for a debt of the firm, unless either he has express authority

to accept each other's drafts, and to share the profits arising from their sale, it was held that one of these firms was not liable to a

therefor from his co-partner, or the giving of such instruments is necessary to the carrying on of the partnership business, or is usual in similar partnerships; and the burden is upon the party suing on such note or bill to prove such authority, necessity, or usage. Smith *v.* Sloan, 37 Wis. 285. See, also, Prince *v.* Crawford, 50 Miss. 344.

The rule which authorizes one member of a co-partnership to bind the firm by commercial paper is only applicable to business of a trading or commercial nature, or to the ordinary business of buying or selling for a profit. It has no application to partnerships formed for agricultural purposes or others of a similar character. Ulerg *v.* Ginrich, 57 Ill. 531; Hunt *v.* Chapin, 6 Lans. 139; McCrary *v.* Slaughter, 58 Ala. 230; a partnership for farming, Benton *v.* Roberts, 4 La. Ann. 216, where land was cultivated by joint owners in partnership.

But where a partnership was formed for the purpose of carrying on a farm and a steam saw-mill, and the firm also engaged in trade, as the jury found, and the managing partner drew bills in the name of the firm on an accommodation acceptor, to raise money: *Held*, that the firm were bound by them. Kimbro *v.* Bullitt, 22 How. 256.

A partnership in the business of buying cattle and slaughtering them for sale, and dealing in vegetables and like commodities, is a commercial partnership, each member of which has the right to draw, accept, or indorse bills of exchange in the firm name, and bind the partnership as to third persons, dealing fairly and in good faith as to matters usually incident to the business; and it is immaterial in such a case as to a person thus dealing with one of the partners that the other was not informed of the transaction and repudiated it as soon as it came to his knowledge. Wagner *v.* Simmons, 61 Ala. 143.

A partner gave the note of the firm for a debt contracted by him in the cultivation of sugar upon a plantation of the firm which had been previously used for the cultivation of cotton. It was contended that there was no evidence that the co-partners had consented to this change in the business, and that the making of the note was therefore unauthorized, there being no partnership articles or agreement restricting the business to the cultivation of cotton: *Held*, that it was a question of the continuance of the partnership, and upon the evidence that it did not appear that the partnership, and the consequent power of one partner to bind the firm, had ceased. Burnley *v.* Rice, 18 Tex. 481.

Two persons were partners in the milling business, one owning the mill, and the other furnishing the money for carrying on the business, but having no interest in the mill. The former, without the knowledge, consent or ratification of the latter, gave the firm note to a third person for a lightning-rod put up on the mill. These facts being proved on a trial of an action on the note against the makers, wherein the partner who furnished the money answered under oath denying the execution of the note: *Held*, that there could be no recovery thereon against him, the transaction not being one within the scope of the ordinary affairs of the partnership. Graves *v.* Kellenberger, 51 Ind. 66.

Where one member of a firm had put in as stock his saw-mill and a quantity of saw-logs, against a money equivalent put in by the other: *Held*, that a firm note the former had given for a balance due upon the saw-logs, would not bind

person who had purchased a bill drawn on it by the other firm, but which the drawees had not accepted. (*n*)

If, however, a member of a non-mercantile firm concurs in drawing, or authorizes his partner to draw, a bill in the name of the firm,[3] he impliedly authorizes its endorsement in the same name for the purpose for which it was drawn. (*o*)

the firm although it had received the benefit of the logs, no acquiescence of the co-partner being shown. Wittram v. Van Wormer, 44 Ill. 525.

The mere fact that the business of a firm is that of commission merchants to sell cotton, is not sufficient to raise the presumption that one partner has authority to accept a bill in the name of the firm, where they have not funds of the drawer in their hands. Hibbler *v.* De Forest, 6 Ala. 92.

A partner in the practice of physic has no power to bind his co-partner by the execution of a note in the name of the firm for the purpose of raising money for his own accommodation. Crosthwait *v.* Ross, I Humph. 23.

Two lawyers, who were in partnership, collected money for a client, and one of them spent it. The client drew on them for the money, and the one who spent it borrowed for a few days sufficient to enable him to meet the draft, and then drew a bill on his firm to pay the lender, which he accepted in the partnership name: *Held*, that the other partner was not bound by the acceptance. Breckenridge *v.* Shrieve, 4 Dana, 375.

(*n*) Nicholson *v.* Ricketts, 2 E. & E. 497.

(*o*) See Garland *v.* Jacomb, 8 Ex 216; Lewis *v.* Reilly, 1 Q. B. 349.

[3] Where three persons were engaged in carrying on a steam saw-mill in co-partnership for a specified term, and during its continuance the note of the firm was given, with the concurrence of two of the partners, for necessary supplies ordered by one of them, for the hands engaged in carrying on the business, the partnership was held bound by it. Johnston *v.* Dutton, 27 Ala. 245.

An accommodation indorsement, with several prior indorsers, was given by a firm with assent of all the members, on a note which was discounted by the plaintiff, with knowledge of the facts; and the firm's name, with assent of all the members, was indorsed on several successive notes given in renewal, on which changes and omissions were occasionally made in the names of some of the prior indorsers: *Held*, that the members of the firm were all liable on an indorsement by one of their members, on a note subsequently given in renewal, from which one of the previous indorsers was omitted, which had been on the previous notes, without proof of their assent to the particular indorsement under such a change of circumstances. Dundass *v.* Gallagher, 4 Pa. St. 205.

Where a note was given for money loaned to a firm, and for wheat sold, which was used in erecting their mill, and in making flour for the use of the firm, and the amount thereof was entered in the firm books as an indebtedness of the firm, which books were examined from time to time by a partner denying the execution of a note by him, it was *held*, if he was informed of the making of the note, and made no objection, he was estopped from denying its validity, even if his name was in fact signed by a co-partner. Kitner *v.* Whitlock, 88 Ill. 513.

A note was executed by one partner in the name of the partnership. Afterwards the other partner, on presentation

Bills of companies.

Whether directors, secretaries, or managers of companies have implied power to bind the companies to which they belong by bills of exchange and promissory notes, depends partly on the statutes relating to the privileges of the Bank of England. (*p*) But where these statutes do not apply the power depends on the nature of the company. If its business is such that it cannot be carried on in the ordinary way without the use of bills, &c., its directors have power to draw, accept, and indorse them in the name and on behalf of the company. (*q*) But if its business is not of this description, there is *primâ facie* no such power. This has been decided in the cases of a salvage company (*r*), a *268 mining company (*s*), a gas company (*t*), *a washing company (*u*), a salt and alkali company (*x*), a water works company (*y*), a cemetery company (*z*), a railway company. (*a*)

of the note to him, promised to pay it, not denying that it was a partnership note. In a subsequent suit on it he denied by answer that it was a partnership note, alleging that it was executed for the separate debt of the other partner, without his knowledge or consent: *Held*, that the execution of the note was the only matter in issue, and that the promise to pay was admissible to prove it, and was not inadmissible as a parol promise to pay the debt of another. McGill *v.* Dowdle, 33 Ark. 311.

If one of the partners of a firm has been in the habit of indorsing the name of the firm on bills of exchange, it is a fact from which the jury may legally infer that he had authority from the other partners to do so. Bank of Kentucky *v.* Brooking, 2 Litt. 41.

A single bill, executed by one partner in the name of the firm, binds the firm, if he had authority to execute it; and this may be shown by the consideration, beneficial to both, and their course of dealing in reference to other such bills. Fant *v.* West. 10 Rich. 149.

Where a note is made in the partnership name by one member without the authority of the other, who, however, makes no objection when informed thereof, he is, if benefited as partner, jointly bound. Otherwise, where in the absence of authority he has not impliedly ratified or been benefited by the transaction. Stewart v. Caldwell, 9 La. Ann. 419.

(*p*) As to which see *ante*, p. 185, note.

(*q*) See per Parke, B. and Rolfe, B. in Mayor of Ludlow *v.* Charlton, 6 M. & W. 821, and per Best, J. in Broughton *v.* Manchester and Salford Waterw. Co. 3 B. & A. 1. See, also, Murray *v.* East India Co. 5 ib. 204; and Peruvian Rail Co. 2 Ch. 617.

(*r*) Thompson *v.* Universal Salvage Co. 1 Ex. 694.

(*s*) Dickinson *v.* Valpy, 10 B. & C. 128; Brown *v.* Byers, 16 M. & W. 252.

(*t*) Bramah *v.* Roberts, 3 Bing. N. C. 963.

(*u*) Neale *v.* Turton, 4 Bing. 149.

(*x*) Bult *v.* Morell, 12 A. & E. 745; see the judgment of Coleridge, J.

(*y*) Broughton *v.* Manchester, &c. Waterworks Co. 3 B. & A. 1.

(*z*) Steele *v.* Harmer, 14 M. & W. 831, reversed, but not on this point, 4 Ex. 1.

(*a*) Bateman *v.* Mid-Wales Rail. Co. L. R. 1 C. P. 499. Compare Peruvian Rail. Co. 2 Ch. 617, where the power was held to be conferred by the general words of the articles of association.

Where the directors of a company have power to bind it by bills and notes, a bill or note issued by them improperly but in the name of the company, is binding on it in favor of any *bonâ fide* holder for value without notice of the impropriety. (*b*)

It must be borne in mind that a person who has no authority to use the name of another, so as to render him liable on a bill or note, may nevertheless have sufficient authority to transfer the property therein. (*c*)[1]

Authority to transfer bill.

(*b*) *Ex parte* Overend, Gurney & Co. 4 Ch. 460; Gordon *v.* Sea, Fire and Life Assurance Co. 1 H. & N. 599; Thompson *v.* The Wesleyan Newspaper Assoc. 8 C. B. 849; Allen *v.* Sea, Fire and Life Assurance Co. 9 C. B. 574; Forbes *v.* Marshall, 11 Ex. 166; Maclae *v.* Sutherland, 3 E. & B. 2. See, also, the judgment of Holroyd, J. in 3 B. & A. 10, and compare Stark *v.* Highgate Archway Co. 5 Taunt. 792. In Aggs *v.* Nicholson, 1 H. & N. 165; and Lindus *v.* Melrose, 2 ib. 293, and 3 ib. 177, the point decided was, that the defendants were not personally liable on the notes there in question. These cases by no means decided that the companies would have been liable without proof of authority in their directors to issue notes on their behalf. The marginal notes of the reporters go too far, and are apt to mislead. In Holford *v.* Cameron's Coalbrook, etc. Co. 16 Q. B. 442, and Edwards *v.* Cameron's Coalbrook, etc. Co. 6 Ex. 269, the action was against the company, but the authority of the directors to bind it by bills was not in issue.

(*c*) See on this subject, Smith *v.* Johnson, 3 H. & N. 222; Heilbut *v.* Nevill, L. R. 5 C. P. 478, where, however, the property was held not to pass.

[1] P. was authorized by E. to sell a patent right in five counties, and account to E. for one-half the proceeds, and was authorized to indorse such notes as were received upon sales, for the purpose of turning them into money. The parties in no way held themselves out as partners. As a part of the conspiracy to defraud E., P., without the knowledge of E., indorsed the names of P. and E., as accommodation indorsers, on a note received in the business: *Held*, that the agreement did not constitute P. and E. partners, and, even if they were so, the indorsement was entirely outside of the apparent authority of P., and E. was not liable thereon, even to an innocent holder for value. Hotchkiss *v.* English, 6 Thomp. & C. 658; S. C. 4 Hun, 369.

The indorsement of a promissory note by one of a firm, even without the knowledge of the other partner, vests the title in the indorsee when it is made to pay a debt of the firm, and is, as between them, a lawful application of the partnership property. Commercial Bank of Manchester *v.* Lewis, 21 Miss. 226.

Where the individual note of a partner, made after the dissolution of the partnership, was transferred by the holder to the firm in payment of a debt: *Held*, that such note, being payable to bearer, might be legally transferred to a third person by another partner, who was authorized to settle the accounts of the partnership. Parker v. Macomber, 18 Pick. 505.

An assignment of a note payable to a partnership, in the name of one of the partners, will not pass a legal interest in the note. M'Intire v. M'Laurin, 2 Humph. 71.

Where a note is made by a firm payable to a member of the firm, who indorses it, the indorsee takes only such rights as the indorser had, and cannot

Before leaving the subject of negotiable instruments, it may be observed that it is often difficult to say whether they purport to be the paper of a firm or company, or only that of some one or more of the partners or directors. Unless the paper purports to be the paper of a firm or company, no one whose name is not on the paper is liable to be sued on it. This subject will be adverted to hereafter.

7. Bill in parliament. *269 *7. *Bill in Parliament.—See Extension of business*, p. 279.

8. Bonds. 8. *Bonds.—See Borrowing money and Deeds.*

9. *Borrowing money.*—One of the most important of the implied powers of a partner is that of borrowing money on the credit of the firm.[1] The sudden exigencies of commerce render it absolutely necessary that such power should exist in the members of a trading partnership, and accordingly in a comparatively early case this

9. Borrowing money.

General power to Borrow.

enforce it against the partnership until after the payment of the partnership debts. Simrall *v.* O'Bannons, 7. B. Mon. 608. See, however, Blake *v.* Wheaton, 1 Tayl. 70.

One member of the firm may order the contents of a note made payable to the firm or order, to be paid to himself, and maintain a suit in his own name. Burnham *v.* Whittier, 5 N. H. 334.

A co-partner has not only authority to indorse notes in the name of the firm, but also to waive notice of non-payment, or direct any particular mode of dishonor, and such indorsement and waiver is binding upon the firm, if the holder did not know that they were fraudulently done; and it makes no difference that the note in suit was not running at the time of the waiver. But a partner has no right as against his co-partners to waive notice upon a note indorsed by him for his own benefit. Windham County Bank *v.* Kendall, 7 R. I. 77.

Where a note is indorsed by a partnership in the partnership name, an agreement by one of the partners to receive notice at a particular place, is binding upon his co-partners. Nutt *v.* Hunt, 12 Miss. 702.

A partner may waive grace upon a firm note given by him. Pierce v. Jackson, 21 Cal. 636.

Where a bill of exchange, accepted by a firm, and indorsed in the name of the payee, is, before its maturity, put in circulation by one of the partners, his act is to be considered the act of his co-partners, and estops them, when sued on the bill, from denying the genuineness of the indorsement. Sprague v. Zunts, 18 Ala. 382.

[1] In ordinary commercial partnerships, each partner has the right to pledge the partnership property, or to borrow money and give notes for partnership purposes, in the firm name; and when credit is extended to a partnership within the scope of its business, it will bind all the partners, notwithstanding any secret arrangement they may have among themselves, unknown to those giving the credit. Gregg *v.* Fisher, 3 Brad. (Ill.) 261.

A partner, unless he is a member of a commercial firm, or one engaged in general promiscuous trading, has no implied authority to bind his firm by bor-

power was clearly recognized. (*d*) It has been already seen that one partner can bind the firm by a bill or note, upon which money may be obtained, by the every-day process of discounting; and the power of one partner to pledge partnership goods for ad-

rowing money and executing promissory notes, mortgages, or other securities, unless the money is necessary for the business, and such pledge of the credit of the firm is usual. Davis *v.* Richardson, 45 Miss. 499.

However, in Haskinson *v.* Elliott, 62 Penn. St. 393, it was held that the rule that the partnership is liable for money borrowed by one of its members on the credit of the firm, within the general scope of its authority, and according to the usual course of its business, applies as well to partnerships formed for mechanical or manufacturing purposes as to commercial partnerships, and to special as well as general partnerships.

So, in Leffler *v.* Rice, 44 Ind. 103, it was held that money may properly be borrowed by a partner, to purchase middlings and grain for a mill owned by the partnership, and the latter will be liable therefor.

When a loan is made by two members of a commercial firm, in a matter foreign to the business of the firm, and in disregard of the express opposition of the third member, the two members making the loan are justly chargeable with its amount. Cooke *v.* Allison, 30 La. An. 963.

One who, in good faith, at the request of a partner, advances money to pay what is apparently a firm debt, may recover from the firm. Blinn *v.* Evans, 24 Ill. 317.

A note given by two partners, jointly, for money borrowed for, and used in, the firm business, is a partnership liability, notwithstanding they signed the note before commencing the firm business, and in their several names. So held, in reference to application of assets to debts in bankruptcy. *In re* Thomas, 17 Bankr. Reg. 54.

One partner has not, however, implied power to charge a co-partner by borrowing money in the name of the firm to pay debts incurred before the co-partner entered the firm, and which he has in no way assumed or made himself liable for. Elkin *v.* Green, 13 Bush, 612.

Where H., as managing partner of a firm, in order to procure a loan from a third party, brought to plaintiffs a note payable to such third party, and signed by himself individually, and to induce them to become sureties of the firm for such loan, represented that the proposed loan was on partnership account and for its use, and that his partner would also sign said note individually, which he subsequently did, that being the usual mode of their executing partnership obligations, and upon the faith of such representations the plaintiffs became liable as sureties by signing said note on the credit of the partnership, and the money is borrowed, received, and used in its business: *Held*, that this created a partnership liability, and plaintiffs became sureties of such partnership. McKee *v.* Hamilton, 33 Ohio St. 7.

If a partner borrows money upon the security of his firm's acceptance of another's draft, the acceptance, in the ab-

(*d*) See Lane *v.* Williams, 2 Vern. 277, 292; Rothwell *v.* Humphries, 1 Esp. 406; Denton *v.* Rodie, 3 Camp. 493; Lloyd *v.* Freshfield, 2 Carr. & P. 333; *Ex parte Bonbonus*, 8 Ves. 540; see, too, De Ribeyre *v.* Barclay, 23 Beav. 125; Gordon *v.* Ellis, 7 Man. & Gr. 607; Brown *v.* Kidger, 3 H. & N. 853.

vances is equally well established. (*e*) At the same time, the power of borrowing money, like every other implied power of a partner, only exists where it is necessary for the transaction of the partnership business in the ordinary way; and consequently if money

sence of matter which will avoid it, establishes the relation of debtor and creditor to the amount of the draft, between the firm and the lender. Saltmarsh *v.* Bower, 22 Ala. 221.

A note given in the name of the firm, by one of its members, for moneys collected by him as agent of the payee, is a valid note against the firm, where such moneys were in the nature of a loan to the firm. Whitaker *v.* Brown, 16 Wend. 505.

C., about to go into business with his brother J., put in "as stock for the purpose of forming a partnership with equal shares" certain "gold dust" sent to his wife from his brother R., for which C. subsequently gave his individual note. After the dissolution of the partnership and the death of C., R. brought suit against the surviving partner, for the loan to C., claiming it to be a firm debt. On the trial it was proved that J. used the "gold dust" to buy goods; that he encouraged C. to embark it as capital, and had advised the plaintiff to permit his brother-in-law, C., to put it in the firm as such, but there was no evidence that J. ever assumed any responsibility in regard to it: *Held*, that the loan was a personal credit to C., and not a loan to the firm; hence J. was not liable as surviving partner. Donnelly *v.* Ryan, 41 Pa. St. 306.

Money was obtained on the personal credit of a member of a firm, but was used solely for partnership purposes: *Held*, that this was a good consideration for a subsequent promise of the firm to pay the debt. Siegel *v.* Chidsey, 28 Pa. St. 279.

A and B being co-partners, A upon his individual credit obtains a loan from C of $1,200, which is used in the partnership business, but is credited to A personally on the partnership books, and so remains with A's knowledge and without any dissent on his part for five years; at the end of that time A and B enter into an agreement for the settlement of the partnership affairs, by which B, among other things, agrees in one year to satisfy and discharge all the liabilities of the firm: *Held*, that the loan of $1,200 was personal to A, and that B was not obliged, under his agreement, to pay the amount to C, A's claims against the firm having been expressly excepted from it. Gibbs *v.* Bates, 43 N. Y. 192.

A and B, in 1847, were partners in buying wheat. One C let A have $300, and a few days afterwards took his individual note for it. The money was used to pay for grain that A had purchased. In the fall of 1848, A failed, and in the winter following paid part of the note, and gave his note for the balance, $198. In 1849 C sold the note last named to D for $140, which D then paid him. After D had kept the note some time, C, by an instrument in writing, assigned to D all his claim against A and B, for moneys loaned them in the the spring of 1847. The consideration expressed in the instrument was $193.25, but no new consideration was then received: *Held*, that C, at the time of the sale of the note to D, had a valid claim against the partners A and B, and that this claim was transferred by the sale of the note; or, if not, that it passed by the subsequent assignment. Rose *v.* Baker, 13 Barb. 230.

(*e*) See, *infra*, Mortgage and Pledge.

is borrowed by one partner for the declared purpose of increasing the partnership capital (*f*), or of raising the whole or part of the capital agreed to be subscribed in order to start the firm (*g*), or if the business is such as is customarily carried on on ready money

The complainant avers, in substance, that on, etc. S., as partner in the then existing firm of W. & S., borrowed from the plaintiff, for and on account of and for the use of the said firm, a certain sum, which loan was evidenced by a note for the amount, signed by S., dated on the same day; and that the money so loaned was expended for the use of the firm: *Held*, that under these averments, plaintiff may show that the money was loaned by him to and upon the credit of the firm. There is no admission that the note was taken in payment; and the complaint is good on demurrer. Hoeflinger *v.* Wells, 47 Wis. 628.

Where partners borrow money to be used in the business which they are jointly carrying on, it becomes a partnership fund, and no matter how they stand on the security given to the lender, they are accountable to one another as partners. Baily *v.* Brownfield, 20 Pa. St. 41.

Where an administrator, who is a member of a partnership, applies to the partnership concerns money which belongs to the estate of his intestate, and afterwards gives the note of the firm to the creditor of the intestate, to whom such money was due, in discharge of such creditor's claim on the estate of the intestate, the firm is bound to pay the note, although the money was not in the hands of the firm when the note was given. Richardson *v.* French, 4 Metc. 577.

If a partner carries on a private and a partnership business in the same name, and borrows money in that name, it is deemed to be borrowed for the partnership, no evidence being given to the contrary. Mifflin *v.* Smith, 17 Serg. & R. 165.

This power of borrowing may extend to other things than money. Thus, where two parties are jointly interested in the operation of buying and shipping oats, one party may bind both in borrowing oats to be paid in oats, in their common business and for their common benefit. Adee *v.* Demorest, 54 Barb. 433.

A partner may borrow a note or bill for the purpose of raising money for the use of the firm, provided not more than legal interest be paid for such note or bill. Hutchins *v.* Hudson, 8 Humph. 426.

Where the managing partner of a concern who had been in the habit of borrowing checks for the purpose of meeting the firm's liabilities, a short time before the firm dissolved called at the office of S. and requested his check, which he received, at his request, made payable "to currency," promising to return the amount within an hour or so, until he collect some bills of the firm, which he failed to do: *Held*, that the other partner was liable to pay it, the check having been borrowed on the credit of the firm though the proceeds were not appropriated to the business of the firm. Stark *v.* Corey, 45 Ill. 431.

B., who was a partner in a firm, obtained from R. three bonds of the United States, which were made payable to bearer, to be used by the firm, and to be returned to R. upon request. B. was on his way to San Francisco to purchase

(*f*) Fisher *v.* Taylor, 2 Ha. 218. See as to this, *infra*, pp. 273-274.

(*g*) Greenslade *v.* Dower, 7 B. & C. 635.

principles, *e. g.*, mining on the cost-book principle (*h*), or without borrowing, as in the case of solicitors (*i*), the firm will not be bound unless some actual authority or ratification can be proved. Still less will the firm be bound where borrowing is prohibited and the person advancing the money is aware of the prohibition. (*k*)

a stock of goods for the firm at the time the bonds were delivered to him, and he proposed pledging them, or in some other way raising money upon them, and to use the money so obtained in the purchase of goods. B. lost his life before reaching San Francisco, and the bonds were lost: *Held*, that the firm was liable to R. for the amount of the bonds. Roney *v.* Buckland, 4 Nev. 45.

A misapplication, by one partner, of the funds borrowed, constitutes no defense to suit for payment of the note given therefor, unless it be shown that the plaintiff at the time he loaned the money had knowledge or reasonable grounds to believe that the same was to be used for other than partnership purposes, or the circumstances were such as to put him upon inquiry, and he neglected to inquire. Wagner *v.* Freeche, 56 N. H. 495; Gregg *v.* Fisher, 3 Brad. (Ill.) 261; Hayward *v.* French, 12 Gray, 453; Onondaga Bank *v.* DePuy, 17 Wend. 47; Whitaker *v.* Brown, 16 Id. 505; Steel *v.* Jennings, Cheves, 183; Church *v.* Sparrow, 5 Wend. 223; Haldeman *v.* Bank of Middletown, 28 Penn. St. 440.

Where a person became surety to a bond, given to secure money borrowed by one partner professedly for the firm, and so understood by the lender and the surety, but, in truth, for the individual use of the borrower: *Held*, that, though the creditor could not recover the money from the firm, for want of authority in the partner to bind the firm by deed, yet the surety, upon paying the bond even, voluntarily and without suit, might recover the amount from the firm. Wharton *v.* Woodburn, 4 Dev. & B. Eq. 507.

So the partnership is liable if one of the firm borrows money, not expressly on his individual credit, if it was used for the benefit of the firm. Church *v.* Sparrow, 5 Wend. 223.

If one partner, in negotiating a loan for the partnership, deceives his co-partner, without the privity of the lender, by inserting in the security a private debt of his own, the remedy of such co-partner is against the fraudulent partner only. Dowdall *v.* Lenox, 2 Edw. 267.

Upon a dissolution of partnership a new firm was formed, consisting of the same partners except one. The debts of the old firm were not assumed by the new firm; but one of the partners induced the plaintiff to furnish him with money to purchase notes of the former firm, representing that they could be bought at a discount. Instead of buying up such notes, the partner mentioned made and indorsed, in the name of the old firm, antedated notes, which he delivered to the plaintiff as notes bought by him in the market; and depositing the money received from the plaintiff in bank to the credit of the new firm, afterwards drew it out in the firm name and applied it to the payment of the debts of the old firm. The other partners had no knowledge of the transactions between the partner mentioned and the plaintiff: *Held*, that

(*h*) Hawtayne *v.* Bourne, 7 M. & W. 595; Burmester *v.* Norris, 6 Ex. 796; Ricketts *v.* Bennett, 4 C. & B. 686.

(*i*) Plumer *v.* Gregory, 18 Eq. 624, as to the 1,700*l.*

(*k*) Worcester Corn Exchange Co. 3 DeG. M. & G. 180.

Whether the directors of a company have power to borrow money on its behalf, or not must depend upon the nature of its business and upon its charter, act of Parliament, deed of *settlement, or regulations. Railway and other companies governed by the Companies clauses act, usually have power to borrow by virtue of their special acts. (*l*) A power to borrow is so necessary to a banking company, that its directors can scarcely be deprived of it; and there are several cases in the books in which their power was held

*270 Power of directors to borrow money.

the new firm was not liable upon the notes, in an action upon them by the plaintiff. Dounee *v.* Parsons, 45 N. Y. 180.

Where one of two co-partners obtained money on a note payable at a future day, signed by him with the name of the firm, and with a forged endorsement of a third person, the lender was *held* entitled, on discovering the forgery, to an action for money had and received, even before the maturity of the note, against the partners to whose use the money had gone. Manufacturers' & Mechanics' Bank *v.* Gore, 15 Mass. 75. See also Boardman *v.* Gore, 15 Mass. 331, where there was no evidence that the money went to the use of the firm.

Though the payee of a partnership note believed that the proceeds of the note were to be applied to the individual debts of one of the firm, the note would still be binding on the firm, if the proceeds were in fact used by the firm. Hamilton *v.* Summers, 12 B. Mon. 11.

A firm is not rendered liable for money lent to a member upon his individual credit, by the fact that the money was afterward applied to the benefit of the firm. Union, etc. Bank of Memphis *v.* Day, 12 Heisk. 413; Peterson *v.* Roach, 32 Ohio St. 374.

The fact that a member of a firm, in giving a note for money borrowed, used the form, I promise to pay, and subscribed his own name, and then the firm name underneath it, is a circumstance to be considered by the jury in determining whether the lender had notice that the money was borrowed for the partner's individual use; the other partners are not necessarily holden on the note. Sherwood *v.* Snow, 46 Iowa, 481.

The liability of a partner for the acts of his co-partner, done in behalf of the firm, cannot be held to extend to illegal contracts; and, therefore, where money was borrowed at usurious interest by one member, without the knowledge or consent of the other, the member not participating in such contract is not responsible for the money borrowed. Hutchins *v.* Turner, 8 Humph. 415.

But a partner who knowingly, and without objection, allows the financial partner to continually raise money at usurious rates, thereby impliedly gives him authority to bind the firm to pay usurious interest, from which he can only escape by pleading usury. Hurd *v.* Haggerty, 24 Ill. 171.

(*l*) See 8 & 9 Vict. c. 16, §§ 38, *et seq.*; 26 & 27 Vict. c. 118, §§ 22–35; 29 & 30 Vict. c. 108; 32 & 33 Vict. c. 48, § 1. As to loan notes, &c. improperly issued, see 7 & 8 Vict. c. 85, § 19. In Nowell *v.* Andover Railway Company, 3 Giff. 112, a bill was filed to prevent an illegal exercise of a power to borrow; but as the illegality of the acts sought to be restrained did not sufficiently appear from the statements in the bill, a demurrer was allowed.

to have been exercised so as to bind the company. (*m*) On the other hand, the managers of a benefit building society have no implied power to borrow. (*n*)

Where the directors of a limited company have no power to borrow, power so to do may be conferred upon them by the shareholders; for this is a matter as to which a majority can bind a minority (*o*); and if the directors have already to do whatever the company itself can do, this includes a power to borrow. (*p*) Moreover, a special power given to the directors to borrow to a certain extent does not preclude the company from borrowing to a greater extent with the sanction of the shareholders. (*q*)

Debentures. Debentures are either mere covenants to pay or mortgages under the seal of a company. (*r*) When given to secure money borrowed, their validity depends on the power of the company to borrow; but being under seal it is for the company to move their invalidity. (*s*) The validity of debentures given by way of renewal of former debentures or in lieu of bills or bonds of the company previously issued, depends on the validity of such former instruments. (*t*) Where power exists to issue debentures they may be issued at a discount. (*u*)

*271

Lloyd's bonds. What are called *Lloyd's Bonds* are instruments under the seal of a company, containing an admission by the company of its indebtedness to a specified amount to the obligee, and a covenant to pay him such amount, with interest, on a future

(*m*) Bank of Australasia *v.* Breillat. 6 Moore, P. C. 152, and 12 Jur. 189; Maclae *v.* Sutherland, 3 E. & B, 1; Royal Brit. Bank *v.* Turquand, 5 ib. 248, and 6 ib. 327; Galloway's case, 18 Jur. 885, V. C. S.

(*n*) Kent Benefit Building Society, 1 Dr. & Sm. 417; *Ex parte* Williamson, 5 Ch. 309. An express power to borrow is good if limited. Laing *v.* Reed. 5 Ch. 4; but not if unlimited: Hill's case, 9 Eq. 605; Davis' case, 12 Eq. 516.

(*o*) Bryon *v.* Metropolitan Saloon Omnibus Co. 3 De G. & J. 123.

(*p*) Australian Steam Clipper Co. *v.* Mounsey, 4 K. & J. 733; Gibb's and West's case, 10 Eq. 312.

(*q*) Irvine *v.* Union Bank of Australia, 2 App. Ca. at p. 374.

(*r*) As to the meaning of charging the undertaking, see Panama Mail Co. 5 Ch. 318; Marine Mansions Co. 4 Eq. 601; New Clydach Co. 6 Eq. 514; Gardner *v.* Lond. Chatham, and Dover Rail. 2 Ch. 201. In Norton *v.* Florence Land &c. Co. 7 Ch. D. 332, an obligation to pay the bearer 100*l.* issued by a company and binding it and its estate, property and effects, was held to amount to a bond and not a mortgage.

(*s*) See *infra*, under the head Deeds.

(*t*) See Fountaine *v.* Carmarthen Rail. Co. 5 Eq. 316. Compare Irvine *v.* Union Bank of Australia, 2 App. Ca. 366.

(*u*) Campbell's case, 4 Ch. D. 470. See, also, Regent's Canal Ironworks Co. 3 Ch. D. 43.

day. The validity of these instruments depends on the considerations for which they are given; they are *primâ facie* binding on the company as admissions of indebtedness; but when issued by railway companies for money borrowed after their statutory powers of borrowing have been exhausted, they are altogether illegal and void. (*x*)

An authority to borrow does not warrant the issue of debentures except to secure money lent or to discharge a liability (*y*); nor does an authority to borrow on the security of the funds and property of a company justify a mortgage of its uncalled up capital (*z*); but future debts may be charged by way of security. (*a*) Where directors have power to borrow on mortgage but not on bills of exchange, a mortgage to secure money borrowed and for which bills have been given, is not invalid. (*b*) *Indeed, where the power to borrow exists and money is *272 borrowed, a debt is contracted, although the security given for it may be informal. (*c*) In cases not governed by the repealed act 7 & 8 Vict. c. 110, there does not appear to be any reason why where the directors of a company have power to borrow a loan to the company by one of themselves should be invalid. (*d*)

Exercise of power to borrow.

It has been already seen that where there is power to borrow, securities issued in proper form for money *bonâ fide* lent are binding on the company, although the directors may not have complied with the regulations of the

Validity of securities improperly issued.

(*x*) Chambers *v.* Manchester, &c. Rail Co. 5 B. & Sm. 588; White *v.* Carmarthen Rail. Co. 1 Hem. & M. 786; Cork and Youghal Rail. Co. 4 Ch. 748; Fountaine *v.* Carmarthen Rail. Co. 5 Eq. 316–325. As to debentures issued for debts contracted before the power to borrow commenced, see *Re* Bagnalstown and Wexford Rail. Co. Ir. R. 4 Eq. 505.

(*y*) Inns of Court Hotel Co. 6 Eq. 82; West Cornwall Rail. Co. *v.* Mowatt, 12 Jur. 407.

(*z*) Stanley's case, 4 De G. J. & Sm. 407; Bank of Australia *v.* Abrahams, L R. 6 P. C. 265; and see King *v.* Marshall, 33 Beav. 565. Calls actually made; Gibbs and West's case, 10 Eq. 312; Sankey Brook Coal Co. No. 2, ib. 381, and calls actually determined to be made, although not actually made, Sankey Brook Coal Co. No. 1, 9 Eq. 721, may be mortgaged.

(*a*) Bloomer *v.* Union, &c. Coal Co. 16 Eq. 383.

(*b*) Scott *v.* Colburn, 26 Beav. 276.

(*c*) See Strand Music Hall Co. 3 DeG. J. & Sm. 147.

(*d*) See as to the act referred to, Teversham *v.* Cameron's Coalbrook Co. 3 DeG. & S. 296; Baker's case, 1 Dr. & Sm. 55; Murray's Ex. case, 5 DeG. M. & G. 746.

company relating to such matters. (*e*) It has also been seen that debentures issued by directors in fraud of their shareholders, to a person cognizant of the fraud, are not only invalid in his hands but also in those of subsequent *bonâ fide* holders for value, without notice of the fraud. (*f*) It has also been held that bonds for money lent issued by a railway company which has exhausted its statutory powers of borrowing are invalid. (*g*) But whether if the limit is not set by statute, an excessive exercise of a power to borrow would be held altogether invalid or would be held valid in favor of *bonâ fide* lenders without actual notice of such exercise, has not yet been determined. But the principles of The Royal British Bank *v.* Turquand (*h*) would probably be applied in such a case.

Effect of having had the benefit of money borrowed.

The mere fact that money borrowed has been *bonâ fide* applied to partnership purposes is not sufficient to render the firm liable at law to repay it, where there was no actual or implied authority to borrow, and there has been no ratification of the loan. (*i*)[1] As, however, will be seen hereafter, it is sometimes otherwise on equitable principles. (*k*)

*273 *There is a practical difference between borrowing money and procuring works and materials on credit, which requires notice. The difference consists in this, that he who possesses power to borrow on the credit of another, has a much more extensive, and therefore more easily abused, trust reposed in him than one who is empowered only to pledge the credit of another for value received, when the pledge is given. A power, therefore, to incur debt, which is necessarily incidental to almost every partnership and company, by no means involves a power to borrow money; and the cases which show that adventures in cost-book mines are liable for supplies furnished to the mine (*l*), but not for money borrowed for the purposes of the

Difference between borrowing and obtaining goods, &c., on credit.

(*e*) Royal British Bank *v.* Turquand, 5 E. & B. 248, and 6 ib. 327; Agar *v.* Athenæum Ins. Soc. 3 C. B. N. S. 725; Magdalena Steam Nav. Co. Johns. 690, *ante*, p. 253.

(*f*) Athenæum Life Ass. Soc. *v.* Pooley, 1 Giff. 102, and 3 DeG. & J. 294, *ante*, p. 262.

(*g*) *Ante*, note (*x*)

(*h*) *Ante*, p. 253.

(*i*) See Gallway *v.* Matthew, 10 East, 264; Worcester Corn Exch. Co. 3 DeG. M. & G. 180; Burmester *v.* Norris, 6 Ex. 796; Ricketts *v.* Bennett, 4 C. B. 686; Hawtayne *v.* Bourne, 7 M. & W. 595.

[1] See *ante*, 269, note.

(*k*) This subject will be examined hereafter. See book ii. ch. 1, § 7, and book iii. ch. 3, § 1.

(*l*) Tredwen *v.* Bourne, 6 M. & W. 461; Hawken *v.* Bourne, 8 ib. 703.

mine (*m*), show that the difference here alluded to is judicially recognized. At the same time it must not be forgotten that in equity it has always been held more important to consider how the money has been applied than the form in which a debt has been contracted. (*n*)

Although a company may have no power to borrow, its directors may overdraw its banking account; and if the overdraft is made in the ordinary course of banking business, the bankers may recover the amount of it (*o*) or enforce payment of bills which have been given by the company to secure it. (*p*) Overdrawing banking account.

Connected with the subject of borrowing money, is that of increasing capital. A sole trader who borrows money for the *purpose of his trade, cannot *274 with propriety be said to increase his capital; but if two or more persons are in partnership, and each borrows money on his own *separate* credit, and the money is then thrown into the common stock, the the capitol of the firm, as distinguished from the separate capitals of the persons composing it, may with propriety be said to be increased. But, in this case, the firm is not the borrower, nor is it debtor to the lender for the money borrowed. If a firm borrows money so as to be itself liable for it to the lender, the capital of the firm is no more increased than is the capital of an ordinary individual increased by his getting into debt. When, therefore, it is said that one partner has no implied power to borrow on the credit of the firm for the purpose of increasing its capital, what is meant is, that one partner, as such, has no power to borrow, on the credit of himself and co-partners, money, which each was to obtain on his individual credit, and then to bring Increasing capital.

(*m*) Hawtayne *v.* Bourne, 7 M. & W. 595; Burmester *v.* Norris, 6 Ex. 796; Ricketts *v.* Bennett, 4 C. B. 686; Brown *v.* Byers, 16 M. & W. 252. See, also, Beldon *v.* Campbell, 6 Ex. 886.

(*n*) See, *infra*, § 7, and book iii. ch. 3, § 1. The case of infants is analogous; an infant is liable for necessaries; but he was not liable at law for money lent, though applied in the purchase of necessaries. Darby *v.* Boucher, 1 Salk. 279. But see, in equity, Marlow *v.* Pitfield, 1. P. W. 558. So, a husband was not at law liable for money lent to his wife to enable her to obtain necessaries, and applied by her for that purpose. Knox *v.* Bushell, 3 C. B. N. S. 334. But see in equity, Jenner *v.* Morris, 1 Dr. & Sm. 218; and 3 De G. F. & J. 45; Deare *v.* Soutten, 9 Eq. 151; and observe that in the last case the plaintiff had no ground for suing in equity except his inability to recover at law.

(*o*) Waterlow *v.* Sharp, 8 Eq. 501.

(*p*) *Re* Cefn Cilcen Mining Co. 7 Eq. 88.

into the common stock. (*q*) Unless the expression means this, it means nothing.

Bryon v. Metropolitan Saloon Omnibus Company.

In Bryon *v.* Metropolitan Saloon Omnibus Company (*r*) the capital of a limited joint-stock company had been expended, and a majority of shareholders proposed to borrow money on the credit of the company. A dissentient minority sought to restrain the majority from so doing, and reliance was placed on the doctrine that the capital of the company could not be increased by borrowing money without the consent of all the shareholders. But it was held competent for the majority to borrow money on the credit of the company, and that the doctrine relied on had no application to the case ; the capital of the company being one thing, and that which was sought to be increased by borrowing (viz., the cash in hand) being a different thing.

See further as to borrowing, *infra*, under the head *Mortgages and Pledges.*

[9 *a. Charter Parties.*][1]

10. Cheques.

10. *Cheques.*—One partner has implied power to bind firm by cheques, not post dated (*s*), drawn on the bankers of *the firm in the partnership name (*t*); and if one partner directs the bankers of the firm not to pay a cheque of the firm, the bankers incur no liability to the firm if they follow such directions. (*u*)[2]

*275

(*q*) See Greenslade *v.* Dower, 7 B. & C. 635 ; Fisher *v.* Taylor, 2 Ha. 218, as to the power of one partner to do this.

(*r*) Bryon *v.* Metropolitan Saloon Omnibus Company, 3 De G. & J. 123.

[1] See *post*, 278, note.

(*s*) See Forster *v.* Mackreth, L. R. 2 Ex. 163; Bull *v.* O'Sullivan, L. R. 6 Q. B. 209.

(*t*) Laws *v.* Rand, 3 C. B. N. S. 442. As to cheques drawn by directors, see Gloucester, Aberystwith, &c. Rail. Co. 18 Jur. 815, L. J.

(*u*) An action for dishonoring the cheque would, of course, have to be brought in the names of all the partners, and in the case supposed such an action would not lie; see *ante*, p. 212, and *infra*, Book ii, Chap. 3.

[2] If a partner consents that a check of the firm may be applied on an individual debt of his co-partner, he may at any time before such application is in fact made, or the rights of third parties intervene, withdraw such consent, and after notice by him not to so apply the check, it cannot be so applied. National Bank of Jacksonville v. Mapes, 85 Ill. 67.

When a banker has the funds of a firm deposited with him for the purpose of its especial business, and knows that one of the firm is engaged in individual speculations, and transfers these funds to the separate account of this member, and with a knowledge that the latter appropriates the funds to such speculations, the banker is liable to the firm for

The bankers of a company which has no proper directors may, nevertheless, safely pay checques drawn in its name by those persons who in fact carry on its business, unless the bankers are aware of their want of authority. (*x*)

Bankers who allow a company to overdraw its account have no remedy against the directors personally; although they may have signed the checques or authorized others to sign them. (*y*)

11. *Contracts.*—One partner can bind his co-partners by varying a contract made with both in the ordinary course of business. (*z*)[s] 11. Contracts.

the funds thus misapplied, unless they first assure him of their consent. Billings *v.* Meigs, 53 Barb. 272.

If a bank pays out the money of a partnership to one of the partners upon his check, in fraud of the rights of the other partners, an action at law cannot be maintained in the firm name against the bank, but resort must be had to a court of equity for the relief of those partners claiming to be injured. Church *v.* First National Bank, etc. 87 Ill. 68. See Miller *v.* Price, 20 Wis. 117, as to the necessary parties.

G., a member of a firm, made a check in the firm name, payable to H. or bearer, for the purpose of paying an account due from the firm to H.; but, instead of using the check for that purpose, paid H.'s account by an account which he held individually against H., and by payment of the balance in cash, and subsequently transferred the check to the plaintiff, to pay an individual debt: *Held*, that as it appeared that the check was drawn in good faith to pay a partnership debt, an action would lie upon it against the firm. Gale *v.* Miller, 44 Barb. 420.

Where there are two establishments in the same place for carrying on the same business, both conducted by the same person, in one of which he is a partner, and in the other sole proprietor, and he obtains moneys from a bank on checks drawn by him and signed with his own name as agent, in an action by the bank against the firm, they may show that they are not indebted to the bank, if they did not know the mode in which the checks were drawn. Mechanics', etc. Bank *v.* Dakin, 24 Wend. 411.

A person who is a member of two firms, gives the check of one firm to pay the note of the other, which had been deposited with a banker for collection. In this case, a mutual understanding between the firms may well be presumed, and the person receiving the proceeds of the note is not liable in an action by the former firm to restore them. Nor is the notorious insolvency of the member who drew the note and the check constructive notice of his want of authority. Murphy *v.* Camden, 18 Mo. 122.

(*x*) Mahony *v.* East Holyford Mining Co. L. R. 7 H. L. 869.

(*y*) Beattie *v.* Lord Ebury, L. R. 7 H. L. 102.

(*z*) Leiden *v.* Lawrence, 2 N. R. 283, Ex.

[s] See *post*, 281, note.

One partner has a right to bind the firm to any extent by contracts within the scope of the partnership. Bank *v.* Gore, 15 Mass. 75; Boardman *v.* Gore, id. 331; Galloway *v.* Hughes, 1 Bailey, 553; Winship *v.* Bank, 5 Pet. 529; Storer *v.* Hinkley, Kirby, 147.

A contract to convey lands belonging to a firm, signed with the firm name by

12. *Debentures.*—See *Borrowing Money and Mortgages;* and as to debenture stock of companies governed by special acts of Parliament, see 26 & 27 Vict. c. 118, part 3; and 32 & 33 Vict. c. 48.

12. Debentures.

13. *Debts.*—If a debt is owing to a firm, payment by the debtor to any one partner extinguishes the claim of all, each partner being ostensibly the agent of all the rest to get in debts owing to the firm. (*a*)[4] After a dissolution, payment to any one of the partners discharges the debtor (*b*), even though a third person is appointed to collect the debts owing to the firm, and the creditor is aware of that fact; for it is said there is nothing in such an arrangement to *exclude* any partner from acting as usual (*c*)[5]. But if on a dissolution a debt due

13. Debts.

Payment to one partner.

one partner, under a verbal authority from the other partner, is binding on both. Lawrence *v.* Taylor, 5 Hill, 107.

See Ewell's Evans on Agency, *17 note.

Where two persons as partners in the erection of buildings, have dealt largely with a person in the roofing business, and one of the partners employs such person in and about a building of his own, and the person doing such work has no notice that the work is for the individual partner, but does the work upon the credit of the firm as in prior dealings, a recovery by him for his services against the firm will not be disturbed. Bartlett *v.* Powell, 90 Ill. 331.

(*a*) Anon. 12 Mod. 446.

[4] Payment of a debt to one partner of a firm is good against the other partners, and a release by one partner to a debtor of the firm is obligatory on the others. Scott *v.* Trent, 1 Wash. (Va.) 77; Salmon *v.* Davis, 4 Binn. 375; Gregg *v.* James, Breese, 167; Yandes *v.* Lefavour, 2 Blackf. 371; White *v.* Jones, 14 La. Ann. 681; Vanderburg *v.* Bassett, 4 Minn. 242; Allen *v.* Farrington, 2 Sneed, 526.

Where one of two partners receives money on an executory contract, and the other partner subsequently ratifies the contract, both are liable, if the contract is not fulfilled, though the money may not have been paid over from one partner to the other. Lawrence *v.* Taylor, 5 Hill, 107.

(*b*) Duff *v.* The East India Co. 15 Ves. 198; Brasier *v.* Hudson, 9 Sim. 1. See Phillips *v.* Phillips, 3 Ha. 281, as to the receipts of a surviving partner.

(*c*) Bristow *v.* Taylor, 2 Stark. 50; Porter *v.* Taylor, 6 M. & S. 156; King *v.* Smith, 4 Car. & P. 108.

[5] Neither the insolvency of the partner receiving the money, nor the application he makes of it, affects his right to receive it. Major *v.* Hawkes, 12 Ill. 298; Heartt *v.* Walsh, 75 Ill. 200.

A and B were partners, and on a dissolution of the firm transferred to C all the partnership effects, for the purpose of paying and collecting the debts of the firm. C afterwards transferred the partnership property to B. D, a debtor of the firm, after notice of the transfer, to C, paid his debt to A. B sued D for the debt: *Held*, that as C was not vested with the title of the partnership effects as assignee, payment to A, as one of the firm, was a good discharge of the debt. Gordon *v.* Freeman, 11 Ill. 14.

After the dissolution of a firm which had indorsed a note, the maker paid a sum of money to one of the late partners, and took a receipt signed with the

to the *partnership is assigned to one of the partners, and *276
the debtor has notice of the assignment, he can only pay

firm name, by which it was agreed that the money should be applied to the payment of the note: *Held*, that another partner was not liable on this receipt for the misapplication of the money, the maker of the note not being a dealer with the firm, and being bound to take notice of its dissolution. Sanders *v.* Ward, 23 Ark. 241.

A power of attorney for the sale of land was transmitted through the hands of a partner to the attorney. The attorney sold the land, and afterwards in the settlement of his accounts with the partnership, accounted for the money received for the land, with the partner from whom he had received the papers, and took from him a receipt, signed as if for the partnership, which had been dissolved: *Held*, that the partnership was not liable for the money. Hutchins *v.* Gilman, 9 N. H. 359.

Conversely, payment of a firm debt by one member of the firm, is a payment by the firm. Thus, if one member of a partnership sign a note representing a partnership debt, all the other partners are, as between themselves, under the same obligation to pay the note as the signer. Consequently a payment of the note by a partner other than the signer, although from his private funds, extinguishes the note; nor will it be revived by a bare promise made by the signer to the partner who paid the note, to pay the same. Sprague *v.* Ainsworth, 40 Vt. 47. See, also, Woods *v.* Woods, 127 Mass. 141.

Where the members of a firm gave a bond, individually, for a debt of the firm, and property was delivered by them and accepted as a payment thereof: *Held*, that the bond was thereby discharged, and that it was not in the power of one of the obligors, by agreement with the obligee, to withdraw the payment, and thus again put the bond in force. Jarman *v.* Ellis, 7 Jones, L. 77.

Where one member of a co-partnership pays a judgment rendered upon a firm debt against the members of the firm, he cannot keep the judgment alive and enforce it against his co-partners, either in his own name or in that of a third person to whom he may cause it to be assigned; unless, perhaps, under special circumstances, disclosing some equity entitling him to hold it as security to the extent of the sum which may be found due to him from his co-partners on an accounting. *Prima facie* the judgment was discharged by the payment, and in the absence of proof of such special circumstances, it will be held to be satisfied. Booth *v.* Farmers Bank, 74 N. Y. 228.

A promissory note was executed by three of four members of a firm, and indorsed by the fourth, for the purpose of raising money for the firm business; it was discounted by defendant and its proceeds were so used. An action was brought thereon against the makers and indorser, judgment was perfected against the makers, and subsequently a separate judgment was entered against F., the indorser. F. procured the judgment to be assigned to plaintiff, who had notice of the character of the judgment. Plaintiff paid nothing to the defendant for the assignment, but transferred to F. an interest in certain real estate. F., at or subsequent to the time of the assignment, paid to defendant the amount of the judgment. The assignment provided that it should not affect F.'s liability to defendant. Defendant subsequently executed a satisfaction of the judgment which was discharged of record. In an action to recover damages, *held*, that the payment by F. had the same effect as if there had been but one

the assignee. (*d*)[1] If there are two firms with one common partner, and a bill of exchange is given to one firm and is indorsed by it to the other, payment to the first firm is an answer to an action brought on the bill by the second. (*e*)

Payment to one partner of debt not due to firm.

Moreover, when it is said that payment to one partner is payment to all, it is supposed that the payment is made in discharge of a debt due to the firm. If it is due, not to the firm, but to one of the partners, the rule does not hold. Therefore, if an owner of goods sells them, the purchase-money must be paid to him or his agent; and payment to a person interested with him in the profits accruing from the sale will not do; for though the two may be quasi-partners by reason of their community of interest in the profits, it does not therefore follow that he who is to share the profits is entitled to receive the proceeds of the sale of the goods themselves which belong exclusively to the other. (*f*) So, where a court orders payment to be made to one partner by name, the order must be strictly obeyed, and payment to the partner of the person named in the order will not suffice, though both are defendants in the action in which the order is made. (*g*)

joint judgment against all the partners, and inured to the benefit of all; that if payment was made after the assignment, it none the less operated to discharge the judgment, and the receipt of it by defendant not being in violation of its contract, did not render it liable to plaintiff; nor did the giving of the satisfaction piece, as he could not have enforced the judgment against any of the partners, at least in the absence of an indebtedness from them to F. on the partnership accounts. Booth *v.* Farmers' Bank, *sup.*

A party who had entered into a contract for the sale of goods with one of the members of a firm who was acting for the firm, drew a draft on that member of the firm before any payment was due on the contract, who in turn gave a draft on his partners, which was accepted. In an action to recover the price of the goods against the firm: *Held*, that the draft should be considered as having been given in part payment for the goods, and allowed for in settlement. Getchell *v.* Foster, 106 Mass. 42.

(*d*) See Duff *v.* East India Co. 15 Ves. 213.

[1] If one partner receives from a third person payment of a debt owing by him to the firm, which has been allotted to his co-partner, the latter may maintain an action against him, to recover the amount so received. Crosby *v.* Nichols, 3 Bosw. 450.

(*e*) See Jacaud *v.* French, 12 East, 317.

(*f*) See Smith *v.* Watson, 2 B. & C. 401.

(*g*) See Showler *v.* Stoakes, 2 Dowl. & L. 3. As to payments by the Paymaster-General to one of several partners, see Chancery Funds Rules, 1874, rr. 53, 54.

As one partner can accept payment of a debt due to the firm, so he can effectually release (*h*)[2] and give a valid receipt for such debt. (*i*)[3] It is, however, to be remembered that although one partner has implied authority to get in debts owing to the firm, and to give discharges for them, still a receipt is not conclusive evidence of payment; so that if one partner gives a receipt in fraud of his co-partners, it will not preclude the firm from recovering the money. (*k*) Nor will a release *given by one partner bind the firm if the releasing partner acts in fraud of his co-partners and in collusion with the debtor. (*l*) *277

Receipts given by one partner.

If one of several partners assent to a deed executed by a debtor of the firm in favor of his creditors, the firm is bound by the deed (*m*), and the doctrine, that one partner has no implied authority to bind his co-partners by an instrument under seal, has no application to such a case. (*n*)

Assent to creditor's deed.

One partner can bind the firm by assenting to a transfer of a debt due to it, as for example, to a transfer of the firm's account from their banker to his successor in business. (*o*) So, where a creditor of the firm assigns the debt due to him, and one of the partners recognizes the transfer and promises to pay the transferee, the firm is bound by this promise. (*p*)

Assent to transfer of debt.

(*h*) See Hawkshaw *v.* Parkins, 2 Swanst. 539, and *post*, Release.

[2] See, *ante*, 275, note.

The law firm of T. & A. rendered services for S., and A. charged them on the books of the firm. T. made a several claim for the same services after the death of S., against his estate, which was allowed and paid, T. executing a release under seal in the name of T. & A.: *Held*, that the release was binding on the firm, as no collusion between T. and the administrator of S. was shown, although the release was made long after the dissolution of the firm of T. & A., and T. was in embarrassed circumstances, and had no attachable property. Thrall *v.* Seward, 37 Vt. 573.

(*i*) Henderson *v.* Wild, 2 Camp. 561.

[3] A receipt being signed by a firm, and the question being, whether the members were bound, or only the one signing it, in the absence of all explanatory evidence, the court should give it the construction which will operate most strongly against those purporting to be bound by it. Hogan *v.* Reynolds, 8 Ala. 59.

(*k*) Farrar *v.* Hutchinson, 9 A. & E. 641; Henderson *v.* Wild, 2 Camp. 561.

(*l*) Aspinwall *v.* The London and N. W. Rail. Co. 11 Ha. 325, and see *post*, Release.

(*m*) See Morans *v.* Armstrong, Arms. M'Art. & Ogle, Ir. N. P. Rep. 25; Dudgeon *v.* O'Connell, 12 Ir. Eq. 566.

(*n*) Dudgeon *v.* O'Connell, 12 Ir. Eq. 566.

(*o*) Beale *v.* Caddick, 2 H. & N. 326.

(*p*) Lacy *v.* McNeile, 4 Dow. & Ry. 7.

Taking bill in payment.

Again, one partner may receive a bill in payment of a debt due to the firm, and so preclude the firm from suing for the debt so long as the bill is running. (*q*)

Payment to an agent of a firm of a bill drawn in his own name and payable to his own order in respect of a debt due to the firm, is not payment to the firm unless he has authority to draw in that way, or the firm gets the money. (*r*)

Settling debts.

Although each partner has power to receive payment of a partnership debt, and to give a discharge for it on payment, it does not follow that he has power to compromise or settle the debt in any way he likes without payment.[1] As

(*q*) See Tomlins *v.* Lawrence, 3 Moo. and P. 555.

(*r*) See Hogarth *v.* Wherley, L. R. 10 C. P. 630.

[1] A partner has power to compromise and discharge a claim of the partnership against a third party. Noyes *v.* New Haven, etc. R. R. Co. 30 Conn. 1; Doremus *v.* McCormick, 7 Gill, 49.

A partner cannot compromise by receiving land from a debtor instead of money, money being due. Russell *v.* Green, 10 Conn. 269.

Where one partner makes a settlement of matters due the firm by taking a note for the sum due, his misapplication of the note will not invalidate the settlement unless fraudently made by the other party to enable a fraud to be practised on the firm. Heartt *v.* Walsh, 75 Ill. 200.

A settlement by one partner with a debtor of the firm is not binding on the firm, so as to call upon the other partners to falsify it by particular allegations of mistake or fraud, when it compromises individual transactions, which the parties engaged in the settlement knew should not enter into the firm accounts. Rust *v.* Hanselt, 41 N. Y. Superior Ct. 467. See next note, *infra*.

B. C. & Co having a claim on a railroad company, under a contract for the construction of the road, which was payable in stock of the company, assigned it to W. to secure an indebtedness to him of about $10,000, with full power to collect of the company the whole amount due. The railroad company and W. were afterwards factorized by certain creditors of B. C. & Co., whose claims amounted to about $28,000. After finishing the work, all the members of the firm except B. went away to distant parts, having first given written notice to the railroad company *not to pay any money or stock, or dispose of any property of the firm upon the authority of B.* Sometime after, B., assuming to act for B.C.& Co., W., as assignee of their claim, the attaching creditors, and the railroad company made a general settlement of the affairs of B. C. & Co. with the railroad company, in which the attaching creditors assigned their claims to W., the railroad company transferred to W. $30,000 of the stock of the road, and B. C. & Co., by B., released the railroad company from all further claim under the contract. The settlement was made by all parties fairly, and B. intended to benefit B. C. & Co., and did in fact benefit them by the settlement. All the stock received by W. was applied in payment of his own claim and the claims so assigned to him. The other members of the firm three years afterwards, in the name of the firm, assigned to another creditor their claim on the railroad company and on W. on a bill in

a general proposition, an authority to receive payment of a debt does not include an authority to settle it in some other way (*s*); and a partner has no implied authority to discharge a separate debt of his own by agreeing that it shall be set against a debt due to his firm. (*t*)[1]

chancery brought by him against the railroad company and W., praying that the settlement be set aside, and that the accounts be adjusted, it was *held*, dismissing the bill, that B. had full power to make the settlement, and that the notice of the other members of the firm that nothing should be paid out on the authority of B., could not affect the right already possessed by W. under the assignment previously executed by the firm, to receive the full amount of the claim from the railroad company. Whether, if the other members of the firm had given notice to the railroad company that they should not *assent* to any *settlement* made by B., a settlement made by him should be binding on them: *Quere?* Cannon *v.* Wildman, 28 Conn. 472.

A was member of the firms, A and B, and A and C, and was managing partner in both concerns. Both firms had dealing with the firm of D and E. The firm of A and B was dissolved by the death of B, and was, at the time, largely indebted to A and C, who were also indebted to D and E. A after B's death, having done the same thing before, transferred the indebtedness of A and C to the firm D and E, from the account between them to the account between D and E, and A and B, and credited the same amount to the last-named firm, on the account between A and B, and A and C: *Held*, that A had, under the circumstances of the case, authority to do this. Peyton *v.* Stratton, 7 Gratt. 380.

(*s*) See the last note, and Young *v.* White, 7 Beav. 506; Underwood *v.* Nicholls, 17 C. B. 239; Story on Agency, § 98.

(*t*) Piercy *v.* Fynney, 12 Eq. 69. See, also, Kendal *v.* Wood, L. R. 6 Ex. 243. Compare Wallace *v.* Kelsall, 7 M. & W. 264.

[1] A partner cannot employ the partnership funds to pay his own pre-existing debt, without the express or implied assent of the other partners. Rogers *v.* Batchelor, 12 Pet. 221; Pierce *v.* Pass, 1 Port. 232; Dob *v.* Halsey, 16 Johns. 34; Leonard *v.* Winslow, 2 Grant Cas. 139; Purdy *v.* Powers, 6 Pa. St. 492; McKinney *v.* Brights, 16 Pa. St. 399; Sauntry *v.* Dunlap, 12 Wis. 364; Burwell *v.* Springfield, 15 Ala. 273; Nall *v.* McIntyre, 31 Ala. 532; Filley *v.* Phelps, 18 Conn. 294; Bourne *v.* Woolbridge, 10 B. Mon. 492; Jackson *v.* Holloway, 14 Id. 133; Jones *v.* Lusk, 2 Metc. 356; Minor *v.* Gaw, 19 Miss. 322; Buck *v.* Mosley, 24 Miss. 170; Goode *v.* McCartney, 10 Tex. 193. See, also, *post* 293, note.

A partner cannot bind the partnership for his private debts without the assent of his co-partners; and if such assent is given, it is the province of the jury to judge of the extent of it, and it is error for the court to rule upon the point as a question of law. Noble *v.* M'Clintock, 2 Watts & S. 152.

The consent of one partner to the application by the other partner of the price of firm goods in payment of the individual debt of the latter to the buyer will not be inferred from the mere knowledge of the transaction. Todd *v.* Lorah, 75 Pa. St. 155.

If a partner consents that a check of the firm may be applied on an individual debt of his co-partner, he may at any time before such application is in fact made, or the rights of third parties in-

*278 *A promise by one partner to pay a debt owing by the firm, undoubtedly binds the firm. (*u*) How far a promise by one partner will prevent the statute of limitations from running in favor of the others will be seen hereafter. (*x*)

Promise by one partner to pay a debt of the firm.

tervene, withdraw such consent, and after notice by him not to so apply the check, it cannot be so applied. National Bank of Jacksonville *v.* Mapes, 85 Ill. 67.

The defendant's agent sold and delivered to one of the partners of a grocery firm, to which the defendant was indebted for groceries, certain cattle belonging to the defendant, agreeing to receive the price thereof in groceries at the store of the firm, and that the amount already due should be included as part payment of such price: *Held*, that such agreement was not binding upon the firm, without affirmative proof of their knowledge and consent thereto, and that, in the absence of such proof, their assignee in insolvency might recover against the defendant the whole amount of his account. Cadwallader *v.* Kroesen, 22 Md. 200.

An attempt by one partner to sell his interest in partnership property in payment of his individual debt is a breach of the partnership agreement; and if the purchaser knew that the property conveyed was partnership property, he is deemed to have had notice of the trust, and is held to have purchased only what his vendor could equitably convey; *i. e.*, the legal estate of the vendor, subject to the state of the partnership accounts. Ross *v.* Henderson, 77 N. C. 170.

An agreement between one member of a mercantile partnership and a practicing physician, who has knowledge of the partnership, that the latter shall obtain goods from the partnership in payment for professional services rendered and to be rendered to such partner individually, is outside of the partnership business, and beyond the partner's authority; and such agreement is not binding on his co-partner, or the partnership, unless expressly authorized, or subsequently ratified. In such case, an offer by the other partner, when trying to collect the account due to the partnership to allow the physician's as a credit or set-off, if he will pay the balance in money, is not a ratification of the unauthorized agreement under which the account was contracted. Hust *v.* Clarke, 56 Ala. 19.

One of the partners being indebted to the plaintiff, it was agreed that he might take goods out of the store in payment of the debt, and that the same should be charged to the individual partner. Upon dissolution, the partner originally indebted transferred his interest to his co-partner, who afterwards assigned for the benefit of creditors: *Held*, that the assignee was not entitled to recover for goods sold before the assignment, but that, for those sold afterwards he could recover, unless it was shown that they were sold by him in pursuance of the original agreement. Woodward *v.* Horst, 10 Iowa, 120.

If a partner applies partnership funds to the payment of his own debts, the money it is said may be recovered back, although the creditor did not know that the funds belonged to the partnership. Moriarty *v.* Bailey, 46 Conn. 592.

(*u*) Anon. *v.* Layfield, Holt, 434; Lacy *v.* McNeile, 4 Dow. & Ry. 7.

(*x*) A promise to one enures for the benefit of all. White *v.* Williams, Willm. Woll. & Hod. 52.

If a debt is owing to a firm, tender to one partner is tender to all; and if a debt is owing by a firm, tender by one partner is tender by all (*y*); and if, after tender by a

Tender.

See *contra*, Wiley *v.* Allen, 26 Geo. 568.

But this rule would seem to need some qualification to prevent injustice to a creditor who has received payment of his debt, and parted with security held for it, while having no knowledge or reason to suspect that the debt was paid with partnership funds. Moriarty *v.* Bailey, *supra*.

Where a private debt thus paid was a note payable to A or order, and A had it discounted upon his indorsement at a bank, and the maker paid it to the bank when due with partnership funds, it was held that it was not chargeable with the partnership funds thus used, although he was endorser of the note, and interested in its payment, the money having been received by the bank and not by him. Moriarty *v.* Bailey, *supra*.

Where one partner uses the effects of the firm, in the payment of his private debts, with the consent and knowledge of his co-partner, an action by the firm, for the price of these effects, will be barred. Carter *v.* Beaman, 6 Jones L. 44. See *post*, p. 295, note.

It is competent for partners in trade who have taken a note of a customer for goods sold, to make an agreement, while they still hold the note, that it shall be satisfied by work done by the maker for one of the partners individually. If one of the partners make this agreement, and the other assents, and the customer does work enough to cover the note, the note is immediately thereby discharged. Camp *v.* Page, 42 Vt. 739.

The assent of a partner cannot be implied, from the partnership relations, to the payment by his co-partner of his individual indebtedness out of the partnership funds. Such assent must be proved by extraneous evidence. And in the absence of such assent, such payment will pass no property to the separate creditor, as against the partner without whose assent the payment was made, whether he knew that the payment was made out of partnership funds or not. Brewster *v.* Mott, 4 Scam. 378.

A contract by one of two partners in the business of building houses, made without the knowledge of the other, to build a house in payment of a private debt of his own, is a fraud upon the partnership, and void, if the creditor knows that the two are partners in that business; and if both partners actually do the work, they or their assignee in insolvency, may recover therefor of such creditor, without proving the terms of their co-partnership, or that the partner who made the contract agreed that the work should be done by the partnership. Williams *v.* Brimhall, 13 Gray, 462.

See, however, Greeley *v.* Wyeth, 10 N. H. 15, where it was held that where one partner, without the knowledge of his co-partner, makes a special contract to perform labor or sell goods of the partnership, and to take in pay specific articles for his own use; and the contract is executed by the parties who make it, an action cannot be maintained in the name of the partners, to recover the value of the goods so sold or labor performed, on the ground that the partner has no authority to make such contract. Greeley *v.* Wyeth, 10 N. H. 15.

Neither can a member of a firm apply a debt due from his creditor to the firm of which he is a member, to cancel his private debt, without the assent or ratification of the other partners. Pierce *v.*

(*y*) Douglas *v.* Patrick, 3 T. R. 683.

firm, the creditor demands the sum tendered, a refusal to pay made by the partner on whom the demand is made, is a refusal by the firm. (z)

Pass, 1 Port. 232; Pierce v. Hickenburg, 2 Id. 198; Norment v. Johnson, 10 Ired. L. 89; Jones's case, 1 Overt. 455; McNair v. Platt, 46 Ill. 211; Halls v. Coe, 4 McCord, 136; Sims v. Smith, 12 Rich. 685; Harper v. Wrigley, 48 Ga. 570; Thomas v. Pennich, 28 Ohio St. 55; Everingham v. Ensworth, 7 Wend. 326. See, however, Beckham v. Perry, 2 Bailey, 133.

In Homer v. Wood, 11 Cush. 62, it was held that if one member of a partnership settles a demand due from him individually, by setting off and discharging a demand due from his creditor to the partnership, although this is a fraud upon the partnership, no action at law can be maintained in the name of the partnership to recover the demand due it from such creditor, the latter having acted in good faith.

In Strong v. Fish, 13 Vt. 277, attorneys who were partners, rendered services for a client, and afterwards an agreement was made between one of the partners and such client, that the services so rendered, and services thereafter to be rendered, should be applied in payment of a debt due from such partner alone to the client, which agreement was not known to the other partner, and it was *held*, after the death of the partner making the agreement, that the surviving partner could not recover for services rendered by the firm after such agreement; but, as the agreement was executory and without consideration as to the services previously rendered, he could recover for them. Strong v. Fish, 13 Vt. 277.

After the dissolution of a partnership, A, one of the partners, bought a horse of B, and gave his note for the price, agreeing that if any thing should be due from B to the firm, A's note should be applied as a credit on the co-partnership debt. It appeared that the partnership claims on B had been deposited with C, another partner, for collection after the dissolution, but prior to the sale of the horse; but there being no proof that B had notice of this trust, or even of the dissolution: *Held*, that A's contract with B was binding. Combs v. Boswell, 1 Dana, 473.

The rule that when a member of a partnership settles a demand, due from him individually, by setting off and discharging a demand due from his creditor to the partnership, such settlement cannot be rescinded in a suit at law in the name of the firm, was also applied in Craig v. Hulschiger, 34 N. J. L. 363, to a case where one partner indorsed a partial payment upon a promissory note, the property of the firm, in settlement of his individual indebtedness to the maker.

A credit given to one partner on his own separate account is not a discharge, *pro tanto*, of a demand against the partnership, unless it were intended or accepted as such; and if a creditor receive the effects of one of the partners, which he may apply to the payment of his demand against the partnership, yet, if he relinquish and restore the property, he may still hold all the partners. Barker v. Blake, 11 Mass. 16.

Where it appeared that one partner received of the plaintiff certain promissory notes to collect, for which he gave a receipt in his own name, and the plaintiff, to evince the liability of the partners, by showing that the transaction had relation to the partnership business,

(z) Peirse v. Bowles, 1 Stark. 323.

Payment in shares.

Subject to the Companies act, 1867, § 25, companies may pay their debts in paid-up shares instead of cash. (*a*)

offered to prove that such notes were delivered to the partner while he was attending to other concerns of the partnership, to be collected and applied in satisfaction of a note due from the plaintiff to the partnership, and that that partner did accordingly collect one of such notes, and indorse the avails on the plaintiff's note to the partnership: *Held*, that such evidence was admissable. Brown *v.* Lawrence, 5 Conn. 397.

Arrangements between one of a firm, on his individual account, and the maker of a note owned by the firm, that the former, in consideration of a sale to him by the latter, of a lumber interest, should pay and take up the note, in the absence of any agreement by the firm to accept their partner as debtor in place of the maker and indorser of the note, cannot operate as a novation to discharge such maker and indorser. Lewis *v.* Westover, 29 Mich, 14.

An ordinary partnership cannot be held liable for the individual debt of one of its members because of an agreement to that effect between that member and his creditor, unless it be proved that the member was authorized to make the agreement by his co-partners, or that his agreement was ratified by them, or that the partnership was benefited by the transaction. Hamilton *v.* Hodges, 30 La. An. 1290.

Where one of two attorneys, who were partners, received his own notes in part payment of a demand left for collection, and gave the receipt of the firm to the debtor for the claim, and a suit was brought against the attorney's for the amount of the demand: *Held*, that one partner could not show that the other had received his own notes in payment. Cook *v.* Bloodgood, 7 Ala. 683.

A partner may make a valid arrangement, with the consent of his co-partner, with a creditor of the former, that a debt due by the creditor to the partnership may be discharged by crediting it as a payment upon the debt of the partner to him. Bates *v.* Halliday, 3 Ind. 159.

Where one of two partners was individually indebted, and his creditor charged the debt to the firm, and informed both partners that he had done so, and subsequently the indebted partner delivered to the creditor property of the firm in payment of the debt, and this was known to the other partner, who also knew that the creditor supposed that he was receiving the property in payment of the debt: *Held*, in an action on book account, brought by the firm against the creditor, and in which they claimed to recover for the property so delivered, that the creditor was entitled to be allowed for the charge thus made by him against the firm. Miller *v.* Dow, 17 Vt. 235.

Where B is indebted to A, and A is indebted to a firm of which B is a co-partner, and it is agreed between A and B that the one demand shall be set off or extinguished by the other: *Held*, that such an agreement is binding upon a subsequent assignee of A's demand against B, if the assent thereto, express, implied, or to be inferred, of the other members of the firm, can be shown. Wilson *v.* Dargan, 4 Rich. 544.

Partners proved to have known, or to have had good reason to know, that a creditor has relied upon an agreement of one of the firm to allow his individual debt to be applied as a credit on the indebtedness of the creditor to the firm, will not be permitted to repudiate

(*a*) Drummond's case, 4 Ch. 772; Leifchild's case, 1 Eq. 231; and *infra*, book iii. c. 3, § 1, and book iv. under the head Contributories.

14. *Deeds.*—One partner has no implied authority to bind his co-partners by deed (*b*)[1]; but a release of a debt or demand stands on a peculiar ground, and will bind the

14. Deeds.

it, unless they show that they had given notice, at the earliest practicable period after it had come to their knowledge, that they would not sanction the arrangement. Casey *v.* Carver, 42 Ill. 225.

Where an indebtedness from an individual partner to a third person is cancelled by passing a like sum to the credit of such third person in the books of the firm, he may recover the amount in an action of assumpsit against the firm, if the transaction was had with the knowledge or ratification of the other partners. Corbin *v.* McChesney, 26 Ill. 231.

Where two firms have dealt with each other, and each firm has dealt with the members of the other, under an understanding and agreement of the firms and all the members, that the individual account of any partner with the other firm should be considered and treated as matter of firm account against his firm, and dealings and settlements have from time to time been made on this basis, the balance found on such a settlement, made in good faith on the strength and in pursuance of such antecedent agreement and practice, is a legitimate demand as between the parties, on behalf of the creditor firm against the other, for which an action will lie. Such an understanding is not within the provision of the statute of frauds as to promises by one party to answer for the debt of another; purchases and sales made in strict pursuance and on the faith of such an agreement, are entitled to be considered as original transactions on the part of the members of the firm charged. Davis *v.* Dodge, 30 Mich. 267.

A surety for a firm, who is also surety for one of its members individually, receiving funds belonging to the firm, has no right to apply them to the payment of the individual debt, without the consent of the other partner; if he does so, and afterwards pays the firm debt with his own money, he will be considered as having paid it with the partnership funds. Downing *v.* Linville, 3 Bush, 472.

(*b*) Harrison *v.* Jackson, 7 T. R. 207; Steiglitz *v.* Eggington, Holt, 141. As to presuming an authority given by deed, see Holt, 141.

[1] One partner cannot bind his co-partner by deed without especial authority, or unless executed in his presence, and by his consent. Fitchburn *v.* Boyer, 5 Watts, 159; Mackay *v.* Bloodgood, 9 Johns. 285; Little *v.* Hazard, 5 Harr. 291; United States *v.* Astley, 3 Wash. 508; Fleming *v.* Dunbar, 2 Hill (S. C.), 532; Modisett *v.* Lindley, 2 Blackf. 119 Posey *v.* Bullitt, 1 Id. 99; Donaldson *v.* Kendell, 2 Ga. Dec. 227; Napier *v.* Catron, 2 Humph. 534; Morris *v.* Jones, 4 Harr. 428; Trimble *v.* Coons, 2 A. K. Marsh. 375; Lambden *v.* Sharp. 9 Humph. 224; Snyder *v.* May, 19 Penn. St. 235; Blackburn *v.* McCallister, Peck (Tenn), 371; Gerard *v.* Basse, 1 Dall. 119; Hart *v.* Withers, 2 N. J. L. 285; Button *v.* Hampson, Wright, 93; McDonald *v.* Eggleston, 26 Vt. 154; Pierson *v.* Hooker, 3 Johns. 68; Baldwin *v.* Richardson, 33 Tex. 16; Hobson *v.* Porter, 2 Col. Ter. 28; Person *v.* Carter, 3 Murph. 321; Layton *v.* Hastings, 2 Harr. 147; Doe *v.* Tupper, 12 Miss. 261; Morse *v.* Bellows, 7 N. H. 550; Lucas *v.* Saunders, 1 McMull. 311; Lee *v.* Onstott, 1 Ark. 206; Montgomery *v.* Boone, 2 B. Mon. 244; McCart *v.* Lewis, id, 267; Cummins *v.* Cassily, 5 B. Mon. 74; Bentrin *v.* Zierlin, 4 Mo. 417; Turbeville *v.* Ryan, 1 Humph. 113.

A sealed instrument executed by one partner in the name of the firm, may be

firm though executed by one partner only. (*c*)[8] A deed executed by one partner in the name and in the presence of his co-partners,

treated as the deed of all the partners, upon proof that prior to the execution the others had authorized him to execute the instrument, or had, after execution, with full knowledge acquiesced in what he had done. Gibson *v.* Warden, 14 Wall. 244; see, also, Grady *v.* Robinson, 28 Ala. 289.

One party cannot bind the other, by executing an appeal bond for both, under his general authority. People *v.* Judges of Duchess, 5 Cow. 34; Charman *v.* McLane, 1 Oreg. 339.

Where, however, property of a partnership was levied upon under a judgment against a part of the firm, for trespass committed by the active and managing members, and the latter, to save the property, procured the plaintiff to unite with them in an appeal bond, whereby he was compelled to pay the judgment, it was *held* that each member of the firm became liable to him for the amount so paid to their use, whether they all united in the appeal or not, and that no proof of a promise to pay on the part of one of them not sued, and who did not join in the appeal, was necessary, as the law implied a promise, and that in such case the validity of the judgment appealed from was wholly immaterial. Durant *v.* Rogers, 87 Ill. 508.

And where an appeal from the disallowance of a claim of partners in their firm name, the appeal bond is executed in the firm name, the presumption, in the absence of all proof, is, that it was so executed as to bind both partners and the mode of execution is approved. Kasson *v.* Brocker, 47 Wis. 79.

Where one partner signs the partnership name to a forthcoming bond, in a case in which the partnership is defendant, the bond is void as to the partners not signing it. Doe *v.* Tupper, 12 Miss. 261; Turbeville *v.* Ryan, 1 Humph. 113.

A partner is not bound by the execution of a replevin bond by his co-partner as surety in his own name, without affirmative evidence of authority so to bind him. Butterfield *v.* Hemsley, 12 Gray 226.

A bond given for the purpose of obtaining a dissolution of an attachment of partnership property, and executed in the name of the firm, by only one of two partners named as principals therein, cannot be enforced against a surety without evidence of the assent of

(*c*) See Hawkshaw *v.* Parkins, 2 Swanst, 539, and as to creditors' deeds, Dudgeon *v.* O'Connell, 12 Ir. Eq. 566. See in cases of fraud, *ante*, p. 277, note (*l*), and *infra*, Release.

[8] See Pierson *v.* Hooker, 3 John. 68; Bruen *v.* Marquand, 17 Johns. 58; Smith *v.* Stone, 4 Gill & J. 310; Morse *v.* Bellows, 7 N. H. 549; Beach *v.* Ollendorf, 1 Hilt. 41; Crutwell *v.* De Rossett, 5 Jones L. 263; McBride *v.* Hogan, 1 Wend. 326; Dyer *v.* Sutherland, 75 Ill. 584. See, also, *post*, 293.

A partner, by an instrument under seal, may authorize a third person to discharge a debt due to the firm. Wells *v.* Evans, 20 Wend. 251; 22 Id. 324.

Where one of two partners, who had entered into a contract to do a job of work according to specifications, executed an instrument under seal, certifying that the contract was forfeited on their part, and that there had been a settlement and payment to him of a certain sum, as a "present:" *Held*, that such instrument amounted to a release, and took away the cause of action as to both partners. Gates *v.* Pollock, 5 Jones, L. 344.

is deemed an execution by them (*d*);[a] and if one partner executes a warrant of attorney in the partnership name, with the consent of his co-partner, the Court will not set it aside on the ground that the latter did not execute it. (*e*)

the other partner to its execution. Russell *v.* Annable, 109 Mass. 72. See *post* 337, note.

The plea of *non est factum* will be sustained to a bond executed by one partner, in his own name and that of his co-partner, under an authority from such co-partner, not under seal, to execute a note in his name. Henry County *v.* Gates, 26 Mo. 315.

A sealed note signed by one of two partners cannot be given in evidence to establish "an account stated" in a suit brought against the partner who did not sign it. Heath *v.* Gregory, 1 Jones L. 417.

One partner has not the power to convey the realty of the firm by deed or assignment, nor to make contracts about it specifically enforcible against the others. Ruffner *v.* McConnell, 17 Ill. 212.

Where one partner conveys the joint interest of the firm in property, and the deed is signed in the name of the firm, but acknowledged by only one partner as his act and deed, it is necessary for the party receiving the conveyance to show that the partner had the authority thus to convey, otherwise the deed will only pass the individual interest of the signing partner. Walton *v.* Tosten, 49 Miss. 569.

See the subject of partnership property in real estate considered, *post*.

Where two of three partners were present, and one wrote and the other sealed a note, given in the name of the firm, it is competent to go to the jury on the joint execution. It is not material to the liability of the two that they used the name of the firm without the third partner's assent. Potter *v.* McCoy, 26 Pa. St. 458.

Where a partner executes a bond in the name of the firm, and upon being informed that it did not bind the partners, with the consent of the obligee removes the seal, and re-delivers it, with the intent to bind the company, it is effectual as their promissory note. Horton *v.* Child, 4 Dev. L. 460.

A deed executed by one partner in the name of the firm is, however, binding upon the partner who executed it, and upon all other members present or consenting to its execution. Kasson *v.* Brocker, 1 N. W. Rep. N. S. 418; James *v.* Bostwick, Wright, 142; Day *v.* Lafferty, 4 Ark. 450; Lee *v.* Oristoll, 1 Ark. 206; Henderson *v.* Barbee, 6 Blackf. 26; Price *v.* Alexander, 2 G. Greene, 427; Pettes *v.* Bloomer, 21 How. Pr. 317.

However, in Fisher *v.* Pender, 7 Jones L. 483, it was held that where upon the face of an instrument, it appeared that one signed, sealed and delivered it, in order to bind the firm of which he was a member, and not as his own individual deed, he was not individually bound.

A sealed instrument, executed in the firm name by an individual partner, may become obligatory on the other

(*d*) Ball *v.* Dunsterville, 4 T. R. 313; Burn *v.* Burn, 3 Ves. 578. See as to ratifying a deed executed by one person for another, Tupper *v.* Foulkes, 9 C. B. N. S. 797. In Orr *v.* Chase, 1 Mer. 729, a bond executed by one partner in the name and on behalf of the firm, was held to be the bond of the firm; and see Palmer *v.* Justice Assurance Soc. 6 E. & B. 1015.

[a] See note (1) *supra*.

(*e*) Brutton *v.* Burton, 1 Chitty, 707.

A joint and several bond executed by one partner in the name of himself and co-partners, binds him separately, although it is invalid against them (*f*)[1]; and it has been held that a deed *purporting to be made by all the partners of a firm, and *279 to assign all their property to trustees for creditors, is operative against a partner who executes it, although his co-partners ultimately decline to execute it also. (*g*)

partners, upon the principles of estoppel or ratification, whatever objection might be taken originally, on the ground that one partner cannot bind his firm by a sealed instrument. Mann *v.* Etna Ins. Co. 40 Wis. 549; Baldwin *v.* Richardson, 33 Tex. 16; Shirley *v.* Fearne, 33 Miss. 653.

But authority to execute the deed, or a ratification, must be proved before the deed will be admissible as evidence. Shirley *v.* Fearne, *sup.*

The prior authority to execute the deed or the subsequent ratification, may be verbal. Pike *v.* Bacon, 20 Me. 280; Cady *v.* Sheperd, 11 Pick. 400; Clement *v.* Brush, 3 Johns. Cas. 180; Swan *v.* Stedman, 4 Metc. 548; Fox *v.* Norton, 9 Mich. 207; Gwinn *v.* Rooker, 24 Mo. 290; Smith *v.* Kerr, 3 N. Y. 144; Gram *v.* Seaton, 1 Hall, 262; Bond *v.* Aitkin, 6 Watts & S. 165; Johns *v.* Rattin, 30 Pa. St. 84; Lowery *v.* Drew, 18 Tex. 786; Wilson *v.* Hunter, 14 Wis. 683; Grady *v.* Robinson, 28 Ala. 289; Herbert *v.* Hanrick, 16 Ala. 581; Drumwright *v.* Philpot, 16 Ga. 424; Haynes *v.* Seachrest, 13 Iowa, 455; Ely *v.* Hair, 16 B. Mon. 230.

The assent of the other partners may be implied from circumstances. Person *v.* Carter, 3 Murph. 321; Lucas *v.* Sandars, 1 McMull. 311; Lee *v.* Onstott, 1 Ark. 206.

And such assent may be subsequent to the execution of the deed. Person *v.* Carter, 3 Murph. 321; Doe *v.* Tupper, 12 Miss. 261; McCart. *v.* Lewis, 2 B. Mon. 267; but see Layton *v.* Hastings, 2 Harr. 147, and Turbeville *v.* Ryan, 1 Humph. 113.

An action brought by a partnership upon a sealed instrument, executed by one of the partners in the partnership name, is an adoption of the instrument, and the defendant cannot object that it is not the deed of the partnership. Dodge *v.* M'Kay, 4 Ala. 346.

Where, in the agreement of partnership under seal, each partner was authorized to bind his co-partners by deed, and such agreement expired by its own limitation, and was continued by a written agreement not under seal: *Held*, that the continuation did carry with it the power; and that a mortgage of real estate, executed by one of the firm to secure the partnership, did not bind the other members. Napier *v.* Catron, 2 Humph. 534.

Though one partner cannot bind another by deed or bond, by virtue of the partnership relation merely, yet a declaration alleging that the partners "made their certain writing obligatory, signed by their firm name," "and sealed with their seal," etc., is good on demurrer; if it was the deed of but one, it must be shown by plea on the part of the partner who did not execute the

(*f*) Elliott *v.* Davis, 2 Bos. & P. 338.

[1] See note (1) *supra.*

(*g*) Bowker *v.* Burdekin, 11 M. & W. 128; Cumberledge *v.* Lawson, 1 C. B. N. S. 709; and Compare Latch *v.* Wedlake, 11 A. & E. 959, and Lascaridi *v.* Gurney, 9 Jur. N. S. 302, C. P.

Deeds of companies.

The inability of one partner to bind himself and co-partners by deed, has little, if any bearing, on the validity of deeds entered into by incorporated companies. The question, whether an instrument sealed with the seal of an incorporated company is binding on the company, depends (1), on the authority by which the seal was affixed to the instrument, and (2), on the na-

bond. Massey *v.* Pike, 20 Ark. 92.

A bond given by one partner for a simple contract debt due from the partners to the creditor, and accepted by him, is, by operation of law, a release of the other partner, and an extinction of the simple contract debt, both at law and in equity; and ignorance on the part of the creditor as to the consequences of his acceptance, is no ground for relief, but the bond is obligatory on the obligor. Williams *v.* Hodgson 2 Har. & J. 474. See, also, Jacobs *v.* McBee, 2 McMull. 348.

When a partner without the consent of his co-partner, gave the security of the firm, under seal, for a partnership debt, and the creditor afterwards released the co-partner from all partnership debts: *Held*, that the simple debt being merged in the specialty, the co-partner was released; but the specialty still bound the partner who had signed the partnership name. Clement *v.* Brush, 3 John. Cas. 180.

It has been held, however, in several cases, that a bond given in the partnership name by one of the partners for a simple contract debt due by the firm, does not, unless accepted as the individual obligation of the partner making it, extinguish the original debt as to the firm. Flemming *v.* Lawhorn, Dudley, 360; Dickinson *v.* Legare, 1 Dessau. 537; Bond *v.* Aitkin, 6 Watts & S. 165; Haskinson *v.* Elliot, 62 Penn. St. 393.

So, it has been held that the execution of a bond without authority, by one of several partners, in the name of the firm, creates no presumption that the bond was received in satisfaction of the joint liability of all the members of the firm. Doniphan *v.* Gill, 1 B. Mon. 199; Brozee *v.* Poyntz, 3 Id. 178.

So it has been held that in an action against partners upon a note under seal, made in the names of the firm by one of its members, although such note may not, because of the scrawl, be operative as a partnership obligation, yet, it being alleged and proved that the consideration for which the note was given went to the use of the firm, and was received by them, they are liable upon the original consideration. Daniel *v.* Toney, 2 Metc. (Ky.) 523.

A bond made by one of the partners of a firm, for goods sold and delivered, may be evidence of the time for payment, or of the amount (as any other statement of one of the partners would be), but it certainly does not amount to plenary proof of the consideration, so as, of itself, to entitle the plaintiff to recover of the firm for goods sold and delivered. Fronebarger *v.* Henry, 6 Jones L. 548. See *post*, 337, note,

A bond, given by one partner for rent of real estate, leased for the use of the partnership, is properly payable out of the partnership effects; and having been so paid, creditors of another partner cannot be substituted to the rights of the landlord on the bond. Christian *v.* Ellis, 1 Gratt. 396.

A bond by two partners, to one of them as obligee, may be obligatory on the other partner. O'Bannon *v.* Simrall, 1 B. Mon. 287.

The rule that one partner cannot bind his co-partner by deed, does not apply

ture of the instrument. An instrument to which the seal has been affixed by a person who has no authority to affix it, is in fact a forged instrument. (*h*) On the other hand, an instrument sealed by the proper officers, is *primâ facie*, binding on the body corporate; and although the presence of the seal does not have the effect of binding the corporation with respect to matters altogether *ultra vires*, it does throw upon the corporation the onus of proving the invalidity of the instrument, and precludes the corporation from taking advantage of the non-observance of preliminary formalities, if the person dealing with its managers had not notice of such non-observance. (*i*)

[14 *a*. *Delivery.*—A delivery in good faith to one partner according to the terms of a contract, is a delivery to both, each having authority to receive it.][1]

where one partner conveys by deed property of the firm which he might have conveyed without deed. Tapley *v.* Butterfield, 1 Metc. 515; Purviance *v.* Sutherland, 2 Ohio St. 478.

A partnership contract which would be good without a seal, will still be valid as a simple contract, although the partner who executed the instrument had no special authority to put the partnership name to such paper. Human *v.* Cuniffe, 32 Mo. 316. See, also, Woodruff *v.* King, 47 Wisc. 261.

See, however, *contra*, Schmertz *v.* Shreeves, 62 Penn. St. 457, which was a sealed contract to deliver merchandise at a future time for a certain price.

Though one partner cannot bind his co-partners, by deed, yet an assignment under seal, executed by one partner, of the effects of the firm, which would be valid and binding on the others if there were no seal, will be enforced in equity. McCullough *v.* Sommerville, 8 Leigh, 415.

However, in Dillon *v.* Brown, 11 Gray, 179, a sealed lease executed by one partner only, in the name of the partnership, though for a term which required no seal, was held not to pass the estate of the other partners, without evidence of previous authority, or subsequent ratification by them.

Where one partner, in the absence of his co-partner, executed a bill of sale, under seal, of all the partnership effects, the sale being *bona fide* and for the full value of the property, and made to pay a pressing debt of the absent partner: *Held*, that the sale was binding upon the absent partner, and passed the whole title of the firm to the property. Forkner *v.* Stuart, 6 Gratt. 197.

One partner may execute a charter-party under seal, so as to bind the other party. Straffin *v.* Newell, T. U. P. Charlt. 163.

(*h*) See Bank of Ireland *v.* Evans' Charities, 5 H. L. C. 389, and per Lord Eldon in Mayor of Colchester *v.* Lowten, 1 V. & B. 244.

(*i*) Bateman *v.* The Mayor of Ashton, 3 H. & N. 323; The Australian, &c. Co. *v.* Mounsey, 4 K. & J. 733; The Royal British Bank *v.* Turquand, 5 E. &. B. 248, and 6 ib. 327; Agar *v.* The Athenæum Life Assurance Co. 3 C. B. N. S. 725; Scott *v.* Colburn, 26 Beav. 276, and see *ante*, p. 253.

[1] Kenney *v.* Atwater, 77 Penn. St. 34.

In an action upon a guaranty of payment of a note for the purchase-money

15. *Distress.*—If several partners grant a lease, any one of them may distrain, or appoint a bailiff to distrain, in the name of all; and a distress by one partner, or by the bailiff appointed by him, will be lawful, although the other partners are no parties to the distress, and do not assent thereto. (*k*)

15. Distress.

16. *Extension of Business.*—It follows from the principles investigated at the commencement of the present chapter, that one partner has no implied power to bind the firm with respect to matters not falling within the scope of the business which it *ostensibly carries on, or was formed to carry on. (*l*) From the same principles it follows, that although the directors of a company may develop the business which it is was formed to transact, they have no power to change the character of such business, nor to enlarge it by embarking in any business not necessary to carry on the first in the usual way. This subject has been already alluded to (*m*), and will be more fully examined hereafter when considering the powers of majorities to bind minorities, and the cases in which injunctions have been granted against directors. (*n*) It is sufficient here to state that in conformity with the principles above alluded to, a company formed for the purposes of life insurance has been held not bound by policies against maritime risks, though issued with the sanction of two general meetings (*o*); that it has been doubted whether a copper mining company could sue on a contract for the supply of iron by itself (*p*); that a canal company has been held unable to obtain by prescription any right to water except for the purposes of its canal. (*q*)

16. Extension of business.

*280

On the other hand, it is now settled that railway companies are

of a steamboat, involving the question of delivery: *Held*, that a transfer by bill of sale and delivery to only one member of a firm, was to the firm, and not to the individual,—the evidence showing that it was in accordance with and fulfilment of the original contract of purchase made by both members of the firm. Byington *v.* Gaff, 44 Ill. 510.

In a suit against partners in a distillery and in the purchase of corn, the plaintiff may give in evidence the receipt of one of the defendants, acknowledging the delivery of a certain quantity of corn to him by the plaintiff. Bisel *v.* Hobbs, 6 Blackf. 479.

(*k*) See Robinson *v.* Hofman, 4 Bing. 562, and the cases there cited.

(*l*) See *ante*, p. 236, *et seq.*

(*m*) See *ante*, p. 249, *et seq.*

(*n*) See book iii. chap. 2, § 3, and chap. 10, § 3.

(*o*) Burges's case and Stock's case, 2 J. & H. 441.

(*p*) Copper Miners' Co. *v.* Fox, 16 Q. B. 229.

(*q*) National Guaranteed Manure Co. *v.* Donald 4 H. & N 8.

bound by contracts to carry or send goods beyond the limits of their own lines (*r*); and a railway company can sue upon a contract between itself and others who undertake to carry passengers and goods from its terminus across the sea in steam vessels. (*s*)

See further in connection with this subject *infra*, under the heads *Leases* and *Transfer of business*.

It will be seen hereafter that it is not competent for the directors of a company to employ its funds in endeavoring to obtain an act of Parliament authorizing it to engage in businesses for which it was not formed. (*t*) And a contract by one *railway company with another, to *231 the effect that the first shall take a lease of the line of the second and pay the expenses of an application to Parliament for an act extending and improving such line has been held illegal and void. (*u*) But in a more recent case, it has been held that a railway company is liable to pay for surveys, plans, &c., made by order of its directors for the purpose of an application to Parliament for an extension of powers. (*x*)

Application to Parliament for extended powers.

[16 *a*. *Gifts*.][1]

17. *Guaranties, &c.*—How far one partner can bind the firm by a guarantie, obliging the firm to pay, if some other person does not, has been much disputed. The later cases, however, decide that unless it can be shown that the giving of guaranties is necessary for carrying on the business of the firm in the ordinary way, one of the members will be held to have no implied authority to bind the firm by them; for, generally speak-

17. Guaranties and indemnities.

(*r*) Wilby *v.* West Cornwall Rail Co. 2 H. & N. 703, and the cases there cited; Great Western Rail. Co. *v.* Blake, 7 H. & N. 987.

(*s*) South Wales Rail. Co. *v.* Redmond, 10 C. B. N. S. 675. Compare Colman *v.* Eastern Counties Rail. Co. 10 Beav. 1.

(*t*) See *infra*, book iii. chap. 2, § 3, and ch. 10, § 3.

(*u*) Eastern Anglian Rail. Co. *v.* Eastern Counties Rail. Co. 11 C. B. 775. See, also, M'Gregor *v.* Dover and Deal Rail. Co. 18 Q. B. 618; Maunsell *v.* Midland Great Western Rail. Co. 1 Hem. and M. 130; Taylor *v.* Chichester and Midhurst Rail. Co. L. R. 2 Ex. 356.

(*x*) Bateman *v.* Mayor of Ashton-under-Lyne, 3 H. & N. 323; Bramwell, B. dissented.

[1] Where a partner made a gift of two-thirds of a crop of corn to his son, who took it and appropriated it to his own use: *Held*, in an action by the other partner in the name of the firm for his own use to recover his share of the value of the corn, that a partner cannot make a valid gift of partnership property, to the prejudice of his partner, and that assumpsit can be maintained against the donee for the value of the partnership property so given. Daniel *v.* Daniel, 9 B. Mon. 195.

ing, it is not usual for persons in business to make themselves answerable for the conduct of other people.[3] The subject was much

[3] One partner cannot, by his individual act, bind the firm as the guarantor of the debt of another, or as a party to a note or bill made for the accommodation or as the surety of another, without authority specially given him for the purpose, or implied from the common course of business of the firm, or from the previous course of dealings between the parties; unless the act of such partner be afterwards ratified by the others. The burden of proving the authority and consent of the other partners lies on the holder of the note. Sweetser *v.* French, 2 Cush. 309; Rollins *v.* Stevens, 31 Me. 454; Bank of Rochester *v.* Bowen, 7 Wend. 158; Foot *v.* Tabir, 19 Johns. 154; Boyd *v.* Plumb, 7 Wend. 309; Langan *v.* Hewett, 21 Miss. 122; Andrews *v.* Planters' Bank, 15 Miss. 192; Schermerhorn *v.* Schermerhorn, 1 Wend. 119; Rolston *v.* Click, 1 Stew. 526; Mayberry *v.* Barniton, 2 Harr. 24; Maudlin *v.* Branch Bank, 2 Ala. 502; Selden *v.* Bank of Commerce, 3 Minn. 166; Hamill *v.* Purviss, 2 Pa. 177; Sutton *v.* Irwine, 12 Serg. & R. 13; McQuewans *v.* Hamlin, 35 Pa. St. 517; Marsh *v.* Thompson Nat. Bank, 2 Brad. (Ill.) 217; Davis *v.* Blackwell, 5 id. 32.

Each partner is, however, the general agent of the firm, and has authority to bind it by a contract of guaranty, if such contract is within its scope of business; and no understanding between the partners can effect the right of the guarantee to recover. First Nat. Bank *v.* Carpenter, 41 Iowa, 518.

Where a note is executed as the individual note of one of the partners, and the guaranty of the firm is indorsed thereon, it is *primâ facie* evidence of an individual debt, and the burden of proof is upon the party seeking to enforce its payment, to show that it was in fact a partnership transaction. Davis *v.* Blackwell, 5 Brad. (Ill.) 32.

Where a firm had authorized a partner to borrow money for it, and allowed him frequently to fill up notes over their blank signatures, and to sign the names of the members of the firm to obligations, and such partner borrowed money for the use of the firm, upon his note, with the names of his co-partners indorsed thereon as guarantors: *Held*, that it did not matter even if their names were so signed by such partner, as he was held out to the world as having authority to do what he did, and that he had power to consent to an alteration of the note, as to the place of payment, at the time he delivered the same and obtained the money thereon, and that the other partners were liable on such guaranty. Pahlman *v.* Taylor, 75 Ill. 629.

If on the face of the paper it appears that the firm purports to execute it, not as a principal, but as a mere surety or guarantor for some other person, the party taking the paper has actual notice of the fact that it is not signed in the ordinary course of the partnership business, and he must at his peril ascertain that there was a special authority given the partner to use the firm name as such guarantor, or that the paper was in fact given in the course of the partnership business. Marsh *v.* Thompson Natl. Bank, 2 Brad. (Ill.) 217.

That one partner was authorized to subscribe the firm name as accommodation sureties for a third person, may be proved by circumstances. Butler *v.* Stocking, 8 N. Y. 408.

The power to sign the firm name, by indorsement, for accommodation purposes, would not authorize the signature of the firm name in the face of the note, as an unconditional and distinct surety. McGuire *v.* Blanton, 5 Humph. 361; Early *v.* Reed, 6 Hill, 12.

In Wilkins *v.* Pearce, 5 Den. 541, it

considered in Brettel *v.* Williams. (*y*) There the defendants, who were railway contractors, made a sub-contract for the performance of part of some work they had undertaken. The sub-contractor required a quantity of coal, and one of the defendants, in the name of the firm, guaranteed to the plaintiffs, who were coal merchants, payment for coals to be supplied by them to the sub-contractors. It was held that this guarantie did not bind the partners of the contractor signing it. Brettel *v.* Williams.

In Sandilands *v.* Marsh (*z*) a firm was held bound by a guarantie given by one of the partners, but in that case there was evidence of adoption and ratification by the firm of the contract of which the guarantie was part. This case cannot *therefore be considered as opposed to those in which it has been held that one partner has no implied power to bind the firm by guaranties in its name. Sandilands *v.* Marsh. *282

With respect to the statute of frauds, a guarantie signed by one partner in the name of the firm, is sufficient to bind all the partners, if authority from them can be proved. (*a*) Statute of frauds.

was held that an agreement, made by one partner of a mercantile firm, in the partnership name, to indemnify a third person for accepting, for the accommodation of the firm, a draft drawn upon him by such a partner, is valid, although another of the partners at the time dissented from the agreement.

The right of a partner to sign the firm name to a contract of indemnity in favor of third persons, must be strictly proved, but not necessarily by a written authority to him. Moran *v.* Prather, 22 Wall. 492.

An attorney at law cannot bind his partner by his promise to indemnify an officer for committing a person to jail; but the partnership is a circumstance from which, with other circumstances, it may be inferred he intended to act for both; and where the partner, subsequently to the commitment, ratified the promise, it is binding on such partner. Marsh *v.* Gold, 2 Pick. 285.

Where one partner signs the firm name to an undertaking, given for the purpose of securing the discharge of an attachment of the goods of another firm, without the knowledge or sanction of his co-partners, the latter will not be bound thereby; but where it appears that a partner knew of the signature made by his firm to the undertaking, at the time, and even directed the delivery of the undertaking, he cannot afterwards object that the partnership name was improperly used. Cockroft *v.* Claflin, 64 Barb. 464.

(*y*) 4 Ex. 623. See, also, Hasleham *v.* Young, 5 Q. B. 833; Crawford *v.* Stirling, 4 Esp. 207; Duncan *v.* Lowndes, 3 Camp. 487. The dictum of Lord Mansfield in Hope *v.* Cust, 1 East, 53, and the decision of Lord Eldon in *Ex parte* Gardom, 15 Ves. 286, are opposed to these authorities, but cannot be relied on after the decision in Brettel *v.* Williams.

(*z*) 2 B. & A. 673.

(*a*) See Duncan *v.* Lowndes, 3 Camp. 478.

But no partner is liable for a false and fraudulent representation as to the solvency of another person unless such representation is in writing, and signed by himself. (*b*)

Promise to provide for bill.

If one partner, in consideration that a person will accept a partnership bill, promises that the firm will put him in funds to meet the bill when due, this promise binds the firm. (*c*) But this is not guaranteeing payment of the debt of another within the rule above discussed.

Indemnities by directors.

A company is not bound by an indemnity given by its directors, unless their power to give it can be shown. (*d*) Nor is a company bound by a guarantie given for a fraudulent purpose, and which purpose is known to the person to whom the guarantie is given. (*e*) An agreement by directors, that persons taking shares in a company shall be indemnified by the company against loss, does not bind the company (*f*); nor does an agreement that the company will indemnify outgoing shareholders against their liabilities. (*g*) But directors who personally give such indemities are bound by them. (*h*)

Where two companies have power to amalgamate, an agreement by one of them to indemnify the other against its *283 *liabilities is valid, and capable of being enforced. (*i*) See further as to this subject *infra*, under the head Purchases.

18. Insurances.

18. *Insurances.*—One partner can bind the firm by an insurance of the partnership goods. (*k*) And if one insures for all, he may give notice of an abandonment for all. (*l*)

A life insurance company is not bound by marine policies issued

(*b*) 9 Geo. 4, c. 14, § 6. Swift *v.* Jewsbury, L. R. 9 Q. B. 301; reversing Swift *v.* Winterbotham, L. R. 8 Q. B. 244.

(*c*) Johnson *v.* Peck, 3 Stark, 66.

(*d*) Era Assurance Co. 1 W. N. 309; Ridley *v.* Plymouth Grinding Co. 2 Ex. 711; Kirk *v.* Bell, 16 Q. B. 290; and see, as to guaranteeing profits to other companies, Colman *v.* Eastern Counties Rail. Co. 10 Beav. 1.

(*e*) British and American Tel. Co. *v.* Albion Bank, L. R. 7 Ex. 119; Gray *v.* Lewis, 8 Eq. 526; reversed, but not on this point, 8 Ch. 1049.

(*f*) See Bunn's case, 2 DeG. F. & J. 275.

(*g*) See Munt's case, 22 Beav. 55, and others of that class, which will be noticed hereafter in book iii. ch. 5, § 6.

(*h*) See Barker *v.* Allan, 5 H. & N. 61; Haddon *v.* Ayres, 1 E. & E. 118. Compare Ellis *v.* Colman, 25 Beav. 662.

(*i*) Anglo-Australian Ass. Co. *v.* British Prov. Society, 3 Giff. 521; and on app. 4 DeG. F. & J. 341.

(*k*) Hooper *v.* Lusby, 4 Camp. 66. See Armitage *v.* Winterbottom, 1 Man. & Gr. 130.

(*l*) Hunt *v.* The Royal Exchange Assurance Co. 5 M. & S. 47.

by its directors with the sanction of a general meeting of shareholders. (*m*) Nor is a fire insurance company, which has power to issue marine policies limiting the liability of the company to its funds, bound by marine policies issued in a name which is not the name of the company, and containing no stipulation as to the limit of liability. (*n*)

19. *Interest.*—An admission by one partner that a debt of the firm bears interest at a given rate is *primâ facie* binding on the firm. (*o*) 19. Interest.

See further *ante*, under the head *Debts*.

20. *Judicial Proceedings.*—The power of one partner to act for the firm in legal proceedings will be noticed hereafter, when treating of actions (Bk. II. c. 3, § 1), and bankruptcy (Bk. IV. c. 2). 20. Judicial Proceedings.

21. *Leases.*—One partner, as such, has no authority to contract on behalf of the firm for a lease of a house for partnership purposes. (*p*)[1] 21. Leases.

Where a lease is made by several partners jointly, a notice to quit given by one on behalf of all is sufficient. (*q*)

With respect to leases to and by companies, a company may take on lease a larger house and more land than it wants at the time, and may sublet what it does not actually require at *the time. (*r*) It has also been held that the directors of an hotel company might lease part of the hotel for the purposes of a government office (*s*); but in this case the circumstances were peculiar; the hotel was of an immense size and just finished; the letting was to be temporary; and the whole building could not have been ad- *284

(*m*) Phœnix Life Assurance Co. 2 J. & H. 441.

(*n*) Hambro' *v.* Hull and London Fire Ins. Co. 3 H. & N. 789.

(*o*) See Fergusson *v.* Fyfe, 8 Cl. & Fin. 121.

(*p*) Sharp *v.* Milligan, 22 Beav. 606, where, however, specific performance was decreed against the firm, the contract having been ratified by the other partners.

[1] A partnership may be held jointly liable for rent of premises leased to and in the name of one member only, on proof that they were hired for and used by the firm. Penn *v.* Kearney, 21 La. Ann. 21. See *ante*, 278, note.

(*q*) Doe *v.* Hulme, 2 Man. & Ry. 433; Doe *v.* Summersett, 1 B. & Ad. 135; Goodtitle *v.* Woodward, 3 B. & A. 689. See Right *v.* Cuthell, 5 East, 491.

(*r*) See Horsey's case, 5 Eq. 562.

(*s*) Simpson *v.* Westminster Palace Hotel Co. 2 D. G. F. & J. 141, and 8 H. L. C. 712. See, also, Forrest *v.* Manchester and Sheffield Rail. Co. 30 Beav. 40, and 7 Jur. N. S. 887, as to temporary use of property.

vantageously opened as an hotel at once. It is settled that in the absence of express power so to do, one railway company cannot lease its line to another and exclude itself from using it. (*t*) Where, however, the articles of association of a company authorized two-thirds of the shareholders to require the directors to do any act which the company itself could do, and two-thirds of the shareholders authorized and required the directors to lease the company's works for twenty-one years, and such lease was made accordingly, it was held to be valid and binding on the company and on dissentient members. (*u*)

22. Mortgages and pledges. (a). By partners.

22. *Mortgages and Pledges.*—A legal mortgage cannot be made of partnership real estate without the concurrence of all the partners. (*x*)[1]

(*t*) See Winch *v.* Birkenhead Rail. Co. 5 DeG. & Sm. 562; London and Brighton Rail. Co. *v.* London and S. W. Rail. Co. 4 DeG. & J. 362; Shrewsbury and Birmingham Rail. Co. *v.* Northwestern Rail. Co. 6 H. L. C. 113. See, further, as to this much litigated case, 2 Mac. & G. 324; 3 ib. 70; 16 Beav. 441; 4 DeG. M. & G. 115; 17 Q. B. 652.

(*u*) Featherstonhaugh *v.* Lee Moor Porcelain Clay Co. 1 Eq. 318.

(*x*) See *ante*, heading Deed. In Juggeewundas Keeka Shah *v.* Ramdas Brijbooken Das, 2 Moo. In. Ap. 487, a mortgage by one partner was under peculiar circumstances held to bind the firm.

[1] See *post*, p. 652.

One partner may execute a chattel mortgage of the firm property to secure a partnership debt, without the consent of his co-partner; and his attaching a seal to the instrument, being unnecessary, will not affect its validity. Woodruff *v.* King, 47 Wis. 261.

One partner has authority, without the consent or knowledge of his co-partner, to mortgage the whole stock in trade of the firm to secure a particular creditor of the firm. Tapley *v.* Butterfield, 1 Metc. 515. See, also, Woodruff *v.* King, 2 N. W. Rep. N. S. 452; Willett *v.* Stringer, 17 Abb. Pr. 152; McClelland *v.* Remsen, 3 Abb. App. Dec. 74; Morrison *v.* Mendenhall, 18 Minn. 232; *ante*, p. 269, note.

One partner may execute a valid mortgage of a vessel owned by the firm, by signing the individual names of the members of the firm. Patch *v.* Wheatland, 8 Allen, 102.

The execution of a mortgage of personal property of a partnership by one partner in his individual name, passes no title. Clark *v.* Houghton, 12 Gray, 38.

A mortgage signed with the partnership name, but in the body of which it is recited that it was the act of one of the partners, and given as a security for his individual debt, is not, on its face, a partnership act. Scott *v.* Dansby, 12 Ala. 714.

Under Wagner's (Mo.) Stat. 281, requiring mortgages of personal property to be acknowledged as conveyances of land, are by law required to be a mortgage by a partnership may be signed and acknowledged by any one of the partners, with the firm name, although his name does not appear in the style of the firm. Keck *v.* Fisher, 58 Mo. 532.

A partner recognizing a chattel mortgage on the partnership property, executed by his partner, is estopped to deny its validity. Richardson *v.* Lester, 83

It being, however, decided that a member of an ordinary trading partnership has power to borrow money on the credit of the firm, it follows almost necessarily that he should have power to pledge partnership property as a security for advances. The writer is not aware of any decision in which an equitable mortgage made by one partner by a deposit of deeds relating to partnership real estate has been upheld, or the contrary; he can therefore only venture to submit, that such a mortgage ought to be held valid in all cases in which it is made by a *partner having an implied *285 power to borrow on the credit of the firm. (*y*)

The implied authority of a partner having power to borrow, to pledge the personal property of the firm for money borrowed, is beyond dispute (*z*)[1]; and the power is not

Pledges of chattels.

Ill. 55. See, also, Hawkins *v.* Hastings Bank, 1 Dill. 462.

That individual property is not embraced by a mortgage executed by partners on their property, unless specifically set forth and described. See Reid *v.* Godwin, 48 Ga. 527.

One partner may make a valid mortgage upon the partnership crop to secure a partnership debt, but cannot mortgage the individual property of his co-partner without his consent or acquiescence, under such circumstances as to create an estoppel. Gates *v.* Bennett, 33 Ark. 311.

Although a mortgage by a partner of firm property without his co-partner's consent, to secure his individual debt, will not be permitted to operate as a mortgage, yet if, on a payment of the firm debts and a division of the assets of the firm, such mortgaged property falls to the mortgagor, it becomes operative and can be enforced. Smith *v.* Andrews, 49 Ill. 28.

(*y*) See *Ex parte* National Bank, 14 Eq. 507; Patent File Co. 6 Ch. 83; *Ex parte* Lloyd, 1 Mont. & Ayr. 494. Compare 7 T. R. 210, per Lord Kenyon.

(*z*) See *Ex parte* Bonbonus, 8 Ves. 540; Butchart *v.* Dresser, 10 Ha. 453, and 4 DeG. M. & G. 542; Brownrigg *v.* Rae, 5 Ex. 489; Gordon *v.* Ellis, 7 Man. & Gr. 607. See, also, Langmead's Trusts, 20 Beav. 20, and 7 DeG. Mac. & G. 353; and as to ships, *Ex parte* Howden, 2 M. D. & D. 574.

[1] Gregg *v.* Fisher, 3 Brad. (Ill.) 261.

M. gave money to R. to invest in leaf tobacco, with a verbal agreement that they should share the profits equally, saying nothing about losses. R. used the money to pay his own debts and bought tobacco in the name of M., giving his own acceptances for the purchase-money, and pledging the tobacco for the payment of the acceptances to the defendants, who gave a bill of sale receipted in the name of M. M. was unknown to the defendants, and they were informed by R. that the purchase was for himself, though made in M.'s name: *Held*, that M. and R. were to be regarded as partners in the purchase of the tobacco, and that M. was bound by the agreement of R. pledging the tobacco to secure the payment of his acceptances for the purchase money; that the defendants were not responsible to M. for the misapplication by R. of the money he had received from M.; that the receipted bill given by the defendants in the name of M., on the receiving the acceptances of R., was open to explana-

confined to cases in which there is a general partnership; for, if several join in a purchase of goods to be sold for their common profit, a pledge of those goods by one of the persons interested is binding on them all. (*a*) The implied power to pledge, moreover, extends to pledges for antecedent debts. (*b*)

Redemption.

Any partner may, on behalf of the firm, redeem a pledge of the firm; but he alone is not the proper person to bring an action to recover the thing pledged. (*c*)

Factors' acts.

A question of some importance arises as to the effect, if any, of the Factors' acts (*d*) on the power of one partner to sell and pledge the goods of the firm. The writer is not aware of any authority upon this subject, but he conceives that those acts neither extend nor abridge the power in question. The Factors' acts do not apparently render valid any sale or pledge by one partner of partnership goods, which is not valid, independently of the acts, upon the principles of the common law.

Mortgages, &c., by companies.

With respect to mortgages and pledges by companies *286 little *need be added to what has been said above, and under the head *Borrowing money*. It has been held that a trading company can give a valid bill of sale to secure a debt of the company (*e*); that the directors of a steamship company having general powers of management can mortgage its ships for money borrowed (*f*), and that the directors of a

tion, and did not estop the defendants from holding the tobacco to secure the payment of the acceptances according to their agreement with R. Miller *v.* Sullivan, 1 Cincinnati, 271.

One partner has no authority to agree that private property of the other partner, pledged by him for a firm debt, shall also stand as security for further advances. Beardsley *v.* Tuttle, 11 Wis. 74.

See *post*, 330 and note.

(*a*) Reid *v.* Hollinshead, 4 B. & C. 867; *Re* Gellar, 1 Rose, 297; Raba *v.* Ryland, Gow N. P. 133; Tupper *v.* Haythorne, ib. 135; but see Barton *v.* Williams, 5 B. & A. 395, p. 405, per Best, J., and note that there the goods pledged were not partnership property when the pledge was made. In *Ex parte* Copeland, 2 Mont. & Ayr. 177, it was questioned whether a pledge by one partner was valid if the pledgee had notice that the pledgor was not the only owner, but this it is conceived could only be material where the pledge is not made for ostensible partnership purposes.

(*b*) Patent File Co. 6 Ch. 83, and see Story on Partn. § 101.

(*c*) See Harper *v.* Godsell, L. R. 5 Q. B. 422.

(*d*) 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39. See, upon them, Navulshaw *v.* Brownrigg, 2 DeG. M & G. 441.

(*e*) Shears *v.* Jacob, L. R. 1 C. P. 513; Deffell *v.* White, L. R. 2 C. P. 144, which see as to the mode of complying with the bills of sale act.

(*f*) Australian Steam Clipper Co. *v.* Mounsey, 4 K. & J. 733.

manufacturing company with similar powers can equitably mortgage its property by depositing its deeds (*g*); but that a mortgage of the uncalled-up capital of a company is invalid. (*h*)

As to mortgages by companies governed by the Companies clauses consolidation act, see *ante*, under the head *Borrowing money*, and also 8 & 9 Vict. c. 16, § 38 *et seq.*, and as to debenture stock, 26 & 27 Vict. c. 118, § 22, *et seq.*, 32 & 33 Vict. c 48, § 1.

All limited registered companies are required by the Companies act, 1862, to keep a register of all mortgages and charges specifically affecting their property, and to allow the register to be inspected (*i*); but unregistered mortgages are not necessarily invalid. (*k*)

By the Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78, amended by 33 & 34 Vict. c. 20) (*l*), facilities are given for the issue, by certain classes of companies, of transferable mortgage debentures, upon certain terms and conditions. But the act only applies to, 1, companies governed by the Companies act, 1862, and restricted by their memoranda of association to the objects of advancing money on real securities, and of borrowing money on transferable mortgage debentures, or on real securities (*m*); 2, to companies incorporated by act of *Parliament for similarly restricted purposes. Moreover, the paid-up capitals of these companies must not be less than 100,000*l.*, and each share must be of the nominal value of not less than 50*l.*, of which not less than one-tenth nor more than one-half must have been paid up. Mortgage Debenture Act. *287

(*g*) *Ex parte* National Bank, 14 Eq. 507; Patent File Co. 6 Ch. 83.

(*h*) See *ante*, p. 271.

(*i*) 25 & 26 Vict. c. 89, § 43.

(*k*) General South American Co. 2 Ch. D. 337; Borough of Hackney Newspaper Co. 3 Ch. D. 669; North and South Wales Bank, 10 Eq. 515. Compare Native Iron Ore Co. 2 Ch. D. 345; *Ex parte* Valpy and Chaplin, 7 Ch. 289, where, however, the mortgages were held invalid. In the case of Knowle's mortgage, 6 Ch. D. 556, the Master of the Rolls declined to hold an unregistered mortgage to a director invalid as against an equitable sub-mortgagee from him. This is opposed to *Ex parte* Valpy and Chaplin, 7 Ch. 289, and Native Iron Ore Co. 2 Ch. D. 345, from both of which the Master of the Rolls expressly dissented. In the absence of fraud, it is difficult to see why non-registration of a mortgage can affect its validity or priority. See § 43 of the Act.

(*l*) The act contains a great variety of important provisions, to which it is unnecessary to allude in the present place.

(*m*) There is power to alter the memorandum so as to restrict it to these objects where the memorandum as originally framed includes them, but extends to others as well. See § 3.

One partner has implied authority to accept, in the ordinary course of business, security for a debt due to his firm; and where one member of a firm of bankers accepted as security for money due to the bank, shares in a company, and caused them to be registered in the name of the bank, it was held that he had implied authority so to do, although the consequence was that he thereby rendered himself and his co-partners liable as contributories of the company. (*n*)

(*b*) To partners.

23. *Notice.*—Questions frequently arise as to whether notice to one partner is notice to all.

23. Notice.

As a general rule, notice to a principal is notice to all his agents (*o*); and notice to an agent of matters connected with his agency is notice to his principal. (*p*)[1] Consequently, as a general rule, notice to one partner of any matter relating to the business of the firm is notice to all the other members (*q*)[2]; and if two firms have a common partner, notice which is im-

General rule.

(*n*) Weikersheim's case, 8 Ch. 831.

(*o*) See Mayhew *v.* Eames, 1 Car. & P. 550, and 3 B. & C. 601; Willis *v.* The Bank of England, 4 A. & E. 21.

(*p*) Dresser *v.* Norwood, 17 C. B. N. S. 466, reversing the decision below, 14 C. B. N. S. 574. *Per* Ashhurst, J., Fitzherbert *v.* Mather, 1 T. R. 16; Le Neve *v.* Le Neve, 1 Ves. S. 64; Collinson *v.* Lister, 7 DeG. M. & G. 634; and 20 Beav. 356. Whether a principal is affected by notice acquired by the agent, but not in that character, is perhaps scarcely yet settled. Dresser *v.* Norwood, is a strong authority that in commercial transactions he is.

[1] See Ewell's Evans on Agency, 159, *et seq.*

(*q*) Alderson *v.* Pope, 1 Camp. 404; Porthouse *v.* Parker, ib. 82; Bignold *v.* Waterhouse, 1 M. &. S. 259; and see Salomons *v.* Nissen, 2 T. R. 647.

[2] Howland *v.* Davis, 40 Mich., 546; Fitch *v.* Stamps, 7 Miss. 487; Sanders *v.* Ruddle, 2 T. B. Mon. 139; Barney *v.* Currier, 1 D. Chip. 315; Smith *v.* Hall, 5 Bosw. 319; Herbert *v.* Odlin, 40 N. H. 267. See, also, Manwaring *v.* Griffin, 5 Day, 561.

Thus, where a transfer of a note is made to a firm, one of whose members is a trustee of the company owning the note, the firm has constructive notice of want of authority in the company to make the transfer. Smith *v.* Hall, *supra.*

One partner agreed, on behalf of the the firm, to accept a mortgagee's interest in certain lands, in satisfaction of a debt due to the firm, with full knowledge of the mortgagor's title, took an absolute deed to the firm, and after receiving from the mortgagor the sum due on the mortgage, conveyed his share to a co-partner: *Held,* that notice to him was notice to the firm, and that a reconveyance to the mortgagor might be decreed. Barney *v.* Currier, 1 D. Chip. (Vt.) 315.

Where property is purchased by a partnership, notice to one is notice to all the partners; yet, if one of two persons, about entering into partnership, purchase of the other an undivided interest in property owned by him, to be held by the two for the use of the firm, this principle as to notice does not apply. Herbert *v.* Odlin, *supra.*

putable to one of the firms is imputable to the other also, if it relates to the business of that other. (*r*)[3]

In conformity with these principles, if a firm claims the benefit of a transaction entered into by one of its members, it *cannot effectually set up its own *288 ignorance of what that member knew, so as to be in a better position than he himself would have been in had he been dealing on his own account as a principal. (*s*) Thus in Collinson *v.* Lister, (*t*) it was held that a banking company was not entitled to the benefit of a mortgage given to it by its own manager in his character of an executor. For the mortgage was given as a security for money borrowed by the manager as executor, and advanced by himself as manager for im-

Firm affected by its agent's knowledge.

Collinson *v.* Lister.

The fact that one member of the firm had formerly been the agent of appellants, and had knowledge of an agreement between the members, that the new firm should not deal in goods sold by appellants, does not constitute knowledge on the part of appellant of such agreement. His knowledge of such agreement was acquired as a member of the new firm, and not as agent of appellant. Aultman & Taylor Co. *v.* Webber, 4 Brad. (Ill.) 427.

If A and B are partners, and A is employed as the agent of C, who claims an interest in certain lands, to look after such interest, and B, the other partner, purchases an outstanding title to the land for the benefit of the partnership, inasmuch as the title to the land does not vest in the partnership, but in the individual partners, C will be entitled to treat A as his trustee as to his half of such title, and as holding it for his use. But he cannot hold B liable in the same way, as B is not chargeable with notice of A's agency merely from his relation to him as partner. Hardenburgh *v.* Bacon, 33 Cal. 356.

Notice to a firm cannot affect a member thereof in his individual rights or interests disconnected with those of the firm. Boling *v.* Anderson, 60 Tenn. 551.

Upon trial of a case involving the extent of a water privilege claimed by co-partners, under an alleged appropriation, their notice of location, shown to have been prepared with the knowledge of some of them, and seen by them as a posted notice, and to have been so posted that it "must have been seen" by the others, was held admissible in evidence, as part of the *res gestæ*. McKinney *v.* Smith, 21 Cal. 374.

The fact that one partner was informed at the time that a note was transferred to the firm by another partner, and that the note was given without consideration, being merely lent to the latter, is wholly immaterial. Ross *v.* Whitefield, 1 Sweeny, 318.

(*r*) See Steele *v.* Stuart, 2 Eq. 84; Porthouse *v.* Parker, 1 Camp. 82; Worcester Corn Exch. Co. 3 DeG. M. & G. 180; Jacaud *v.* French, 12 East, 317; Powles *v.* Page, 3 C. B. 16.

[3] Where a bill is drawn by one and accepted by the other, of two firms, having one common partner, formal notice of protest to the acceptors is not necessary. Woodbury *v.* Sackrider, 2 Abb. Pr. 402.

(*s*) See *ante*, p. 212, and *infra*.

(*t*) 7 DeG. M. & G. 634, and 20 Beav. 356.

proper purposes, and in breach of the trusts which, as executor, he had to perform; and the company, in taking the mortgage, knew that their manager was giving a security on his testator's estate for money previously taken by him from the funds of the company, and which monies he had been requested to replace, or give security for. Under these circumstances it was treated as clear that the bank could stand in no better position than the manager would have done had he advanced the money himself and taken a mortgage for it from himself.

Meaning of phrase, notice to one is notice to all.

When it is said that notice to one partner is notice to all, what is meant is (1.), that a firm cannot, in its character of principal, set up the ignorance of some of its members against the knowledge of others of whose acts it claims the benefit, or by whose acts it is bound; and (2.), that when it is necessary to prove that a firm had notice, all that need be done is to show that notice was given to one of its members as the agent and on behalf of the firm. The expression means no more than this; and although every person has notice of what he himself does, it would be absurd to hold that a firm has notice of everything done by each of its members. Where one member is acting beyond his powers, or is committing a fraud on his co-partners, or is the person whose duty it is to give his firm notice of what he himself has done, in all such cases notice on his part is not equivalent to notice by them.

Bignold v. Waterhouse.

In Bignold *v.* Waterhouse (*u*) one of a firm of carriers entered into an agreement to carry valuable parcels free of charge, but under such circumstances as to render the agreement not binding on the other partners. A parcel *289 known to the partner *who made the agreement to be of value, was sent, but was not entered or paid for as a valuable parcel. The other partners were held to be unaffected with the notice which their co-partner had of the nature of the parcel, and not to be liable for its loss.

Breaches of trust.

So, if one partner is a trustee, and he improperly employs the trust funds in the partnership business, his knowledge that he is so doing is not imputable to the firm; and therefore, to affect the other partners with a breach of trust, further evidence must be adduced. (*x*)

(*u*) 1 M. & S. 255.

(*x*) See *Ex parte* Heaton Buck. 386.

Moreover, in cases of this kind, notice on the part the clerks of the firm of what the fraudulent partner is doing is no more than a notice to him: it is not sufficient to affect his co-partners. (*y*)

Notice to clerks.

These cases show what indeed is obvious of itself, viz., that if a partner exceeds his authority, and it is contended that the firm is bound by what he has done, on the ground that it has ratified his acts, evidence must be given to prove that at the time of the alleged ratification his co-partners knew of those acts. It would be absurd to contend in such a case that knowledge by him was equivalent to knowledge by them. (*z*)

Ratification.

Again, to take shares in companies out of the reputed ownership of the registered owner, notice of their assignment must be given, and notice to the secretary of the company is notice to the company. But if the secretary is the person whose shares are in question, the notice which he himself has of what he himself has done, is not imputable to the company; and, consequently, his shares, notwithstanding an assignment of them by him, continue in his order and disposition. (*a*)

Cases of reputed ownership.

A retired partner is not affected with notice on the part of the continuing partners of what has occurred since the partnership, if the agency subsisting between them has been dissolved. (*b*)

*From the principle that the individual shareholders, and even the individual directors of a company are not its agents (*c*), it follows that notice to one of them is not notice to the company (*d*)[1]; and a company is not deemed to have notice *290

Notice to companies, &c.

(*y*) See Lacey *v.* Hill, 4 Ch. D. 537.

(*z*) See acc. the last note.

(*a*) *Ex parte* Boulton, 1 DeG. & J. 163; Browne v. Savage, 4 Drew. 635; Willes *v.* Greenhill, 29 Beav. 376 and 387. See, also, book iv. ch. 2, § 6, under the head Reputed Ownership.

(*b*) Adams *v.* Bingley, 1 M. & W. 192.

(*c*) *Ante*, p. 274 *et seq.*

(*d*) See Powles *v.* Page, 3 C. B. 16; *Re* Carew, 31 Beav. 39; Peruvian Rail. Co. 2 Ch. 617.

[1] This action was brought upon a note made by Charles F. Parker & Co., payable to their own order, indorsed by them, by A. Law, and by the firm of John Savery's Sons. The defendant, Law, who was a member of both firms, indorsed the name of the latter firm without authority, and delivered the note to a firm of brokers to whom he was indebted, who sold the note to the plaintiff and applied the proceeds upon Law's account. One of the firm of brokers who negotiated the sale of the note was a director of the plaintiff: *Held*, that the brokers knowing that Law was using firm paper to discharge an individual indebtedness, could not enforce

through a director of a fraud on the company committed by that director (*e*); nor are two companies having some directors in common necessarily affected through them with notice of each other's affairs. (*f*) Thus where two companies, A. and B., had in common two directors and a solicitor, and company A., in order to buy up its own shares, borrowed money of company B., and this circumstance was known to one of the two directors and to the solicitor, it was nevertheless held that company B. had no notice of the impropriety of the transaction. (*g*) At the same time if, as sometimes happens, one director has authority to act for a company, his knowledge of matters within the scope of his authority affects the company; and it may be said generally that a company is affected by the knowledge of its agents or servants as to matters to which it is their duty to attend, but not as to other matters. (*h*)

24. Payments. 24. *Payments.*—See *ante*, under the head *Debts*.

25. Penalties. 25. *Penalties.*—One partner may bind the firm under a penalty to observe a contract which he is authorized to enter into on its behalf. (*i*)

26. Purchases. 26. *Purchases.*—It has been long decided that every member of an ordinary trading partnership has implied power to purchase on the credit of the firm such goods as are or may be necessary for carrying on its business in the usual way. (*k*)[1] This cannot be more strongly exemplified than by the case of Bond *v.* Gibson. (*l*) There two persons carried on business as harness makers; one of them bought on

Bond v. Gibson.

the same as against the defendants, John Savery's Sons; that the plaintiff having purchased the note in good faith, the knowledge of its director was not to be imputed to it, and that it was entitled to recover. Atlantic Bank *v.* Savery, 18 Hun, 36.

(*e*) Oriental Commercial Bank, 5 Ch. 358; *Re* Carew, 31 Beav. 39.

(*f*) Credit Foncier, &c., Co. 7 Ch. 161; Ebbw Vale Co. 8 Eq. 14.

(*g*) Credit Foncier, &c., Co., 7 Ch. 161. See, also, Gray *v.* Lewis, 8 Ch. 1035, reversing S. C. 8 Eq. 526.

(*h*) British and American Tel. Co. *v.* Albion Bank, L. R. 7 Ex. 119. See, also, Styles *v.* Cardiff Steam Boat Co., 4 N. R. 483, Q. B.; a case as to notice of ferocity of a dog.

(*i*) Beckham *v.* Drake, 9 M. & W. 79.

(*k*) Hyatt *v.* Hare, Comb. 383.

(*l*) 1 Camp. 185.

[1] If there be an agreement of partnership, common or special, for the purpose of purchasing property at certain sales, all the purchases made at such sales by either of the partners, will be considered as made on the partnership account, although the advances by one exceed those of the other. Taylor *v.* Taylor, 2 Murph. 70.

Wherever the original credit was given to the partnership, that will con-

the credit of the firm *a number of bits to be made up into *291
bridles; but instead of using the bits for the partnership

stitute a debt against the partnership, notwithstanding the partner contracting the debt may have given his own separate security, or made himself personally liable therefor. Barcroft *v.* Snodgrass, 1 Coldw. 430.

A sale of goods on credit to one partner in the course of the business of the partnership, is a sale to the firm, unless it be made contrary to an express notice by the other partner not to trust the firm on his account, in which case he alone will be liable who made the purchase, and an action to recover the price cannot be maintained against the firm. Feigley *v.* Sponeberger, 5 Watts & S. 567.

A co-partnership is not chargeable for goods sold to one of the partners for his separate use, although he ordered them to be charged to the firm, if the vendor knew, at the time, that they were for the sole use of that partner. Gullat *v.* Tucker, 2 Cranch C. Ct. 33; Bird *v.* Lanius, 7 Ind. 615.

K. and M. were partners in the hotel business; K. and P. were partners in the grocery business; it was doubtful whether either had a well-settled firm name, and there was evidence that each sometimes used and recognized the name of K. & Co.: *Held*, that one selling goods to K., and taking reasonable care to ascertain for which firm K. was dealing, and believing that firm to be K. and M., and the goods being adapted to the business of that firm, could hold that firm for the price of the goods. Baker *v.* Nappier, 19 Ga. 520.

When a partnership has entered a credit for an article bought by one partner in his private capacity, the vendor has a right to look to the partnership for payment. Dishon *v.* Schorr, 19 Ill. 59.

To bind a partnership to the payment for goods delivered to third persons, it is not enough to show that one of the partners requested the furnishing of the goods to such third persons. Pinckney *v.* Keyler, 4 E. D. Smith, 469.

Where one who boarded hands in the employ of a partnership was authorized by a partner to take up goods on account of the firm, for his family use in that business, and, on his representation to that effect, goods were furnished him on the credit of the firm, though for convenience, merely charged in the first instance to him, and afterwards transferred to the account of the firm: *Held*, that the firm was liable therefor, and that he was a competent witness for the plaintiffs, to show the liability; *a fortiori*, if he were a partner as well as an agent. Scott *v.* Shepherd, 3 Vt. 104.

In assumpsit against partners, under the common counts, proof of a promise by one in the name of the firm is not sufficient; there must be proof of a joint promise, or of the existence of the partnership. Findlay *v.* Stevenson, 3 Stew. 48.

Although a purchase of goods by one partner is made in violation of the articles, yet, if the goods come to, and are used by, the partnership, the firm is liable. Johnson *v.* Bernheim, 76 N. C. 139.

Judicial notice is taken of the mercantile custom of mutual credits under which business establishments furnish each other's clerks or customers with goods, and charge them to each other. It is within the authority of the managing partner to authorize such dealings, and when so authorized they are binding until notice to the contrary. Cameron *v.* Blackman, 39 Mich. 108.

A firm is not exonerated from liability to pay for articles purchased by one member for its legitimate use and busi-

business he pawned them for his own use.[1] The seller of the bits was nevertheless held entitled to recover their price in an action against both partners.

Goods supplied to one partner.

The firm is liable, although the goods may have been supplied to one only of the partners, and no other person may have been known to the supplier as belonging to the firm. (*m*)[2] But, as will be seen hereafter, the firm is not liable for goods supplied to one partner, and which it was his duty to contribute to the joint stock of the firm. (*n*)[3]

ness—plantation supplies in this case—merely because another member has notified the sellers not to extend credit to the former on account of the partnership. Campbell *v.* Bowen, 49 Ga. 417.

If articles of partnership between three persons expressly deny to one partner power to purchase without the written consent of the other two, sales made to the one, for use of the partnership, without such consent, by persons having full notice of the stipulation, will be held to be made on the individual credit of the partner, and not on the credit of the firm. Radcliffe *v.* Varner, 55 Ga. 427.

Though a purchase made by a member of a commercial firm is one outside of its ordinary operations, yet if made for the benefit of the firm and brought to the knowledge of the other partner, who does not repudiate it, but promises to pay the note given in the firm name for the price, he will be bound; and without the written memorandum required of a promise to pay the debt of a third person. Succession of Arick, 22 La. Ann. 501.

[1] If a partner purchase goods in the name of the firm, although he applies them to his individual use, the partnership is liable for the price to the vendor. Dickson *v.* Alexander, 7 Ired. L. 4; Venable *v.* Levick, 2 Head, 351.

(*m*) Ruppell *v.* Roberts, 4 Nev. & Man. 31; City of London Gas Co. *v.* Nicholls, 2 Car. & P. 365; Gardiner *v.* Childs, 8 ib. 345.

[2] Where goods purchased by one partner go into the partnership fund, his co-partners are liable for the price, although the partnership was not known to the seller at the time of the sale. Bracken *v.* March, 4 Mo. 74.

A partnership is liable for lumber purchased by and charged to one of the partners, where it was purchased for partnership purposes. Bruches *v.* Anderson, 14 Mo. 441.

The declaration of a partner after he had purchased a chattel, that he had bought it for the firm, is not sufficient nor competent evidence to render a co-partner liable. White *v.* Gibson, 11 Ired. L. 283. See *ante*, p. 264, note.

Where A, in the storage business and a grain dealer, made an arrangement with an owner of corn to store the same, with the privilege of buying the same, and then formed a partnership with B before the corn was delivered, and after selling and shipping the grain, A gave a note in the firm name for the price: *Held*, that the prior arrangement did not limit his power as a partner after the partnership was formed to purchase the grain, and that the giving of the firm note for the price, amounted to a purchase for the firm, and made B liable on the note. Johnson *v.* Barry, 95 Ill. 483.

(*n*) See book ii. ch. 2, § 3. Greenslade *v.* Dower, 7 B. & C. 635, and cases of that class.

[3] The mere fact that the buyer of goods has put them in a firm as part of his

The power of one partner to bind the firm by a purchase of goods on its credit is not confined to trading partnerships. Thus where some printers and publishers agreed to share the profits of a work, and the publishers ordered paper for that particular work and became bankrupt, the printers were held liable for its price to the stationers who supplied it. (*o*) It is of no consequence what the partnership business may be, if the goods supplied are necessary for its prosecution in the ordinary way.[4]

Non-trading partnerships.

capital, does not render the firm liable to pay the seller for them. The burden is on the creditor to show an agreement by the firm to assume such liability. Morlitzer *v.* Bernard, 10 Heisk. 361.

(*o*) Gardiner *v.* Childs, 8 Car. & P. 345; compare Wilson *v.* Whitehead, 10 M. & W. 503.

[4] See *ante*, 290, note.

A large number of persons associated together by agreement in writing, for the purpose of trade, to be conducted by the direction of a board of managers, a part of whose duty was "to provide a store for the company:" *Held*, that the managers had power to purchase a store and land whereon to place it, and to give the notes of the company to secure the payment of the consideration. Beaman *v.* Whitney, 20 Me. 413.

Where two parties undertake a joint adventure to make a crop, the one to furnish the land and supplies, and the other to furnish and pay the labor, and the profits, if any, to be equally divided, but do not hold themselves out as partners, or give notice of the nature of their association, farther than being seen co-operating on the same plantation. A merchant, dealing with the party who merely furnished the labor, and expecting to bind the crop, under the Mississippi agricultural act of 1867, is bound, at his peril, to acquaint himself with the nature of the association. Cooper *v.* Frierson, 48 Miss. 300.

In an agreement for a partnership for farming, an express stipulation that one partner shall furnish the mules necessary for the business, and that neither shall bind the other by contracts, excludes the inference of authority in the other to bind the partnership by the purchase of mules; and such power cannot be implied, as a matter of law, from the nature and purposes of the partnership. McCrary *v.* Slaughter, 58 Ala. 230.

Four individuals became jointly interested, by an agreement in writing, in a business speculation, involving the purchase of land and the cutting and sale of the timber thereon on joint account. H., one of the parties, was, by the terms of the agreement, to be the acting agent in purchasing the land and carrying on the business: *Held*, that H., in contracting for the purchase of a tract of land, taking possession of the same, and cutting timber thereon, was performing the duty assigned to him by his associates, and that these were jointly responsible for all his contracts with the men hired to labor on such tract, and for supplies furnished to enable him to prosecute the business. Mead *v.* Shepard, 54 Barb. 474. Compare Haskinson *v.* Eliot, 62 Pa. St. 393.

When one partner makes purchase of goods not connected with the known business of the firm, although in the name of the firm, such purchase will not bind the firm, unless an express or implied authority is shown, or a subsequent ratification is proved. Bankhead *v.* Alloway, 6 Coldw. 56.

One of two partners purchased land, and gave a note for the consideration in the partnership name, taking a deed

Return of goods.

If goods are sold to a firm on credit, and are delivered to the firm, and then one partner returns them, the firm not being able to pay for them, the property will be vested in the vendor; subject, in the event of bankruptcy, to the question of fraudulent preference. (*p*)

Companies.

Companies are clearly liable for goods supplied to them for the purpose of carrying on their business, if ordered by their agents. It has been held that the members of a cost-book mining company are liable for goods supplied to the mine by the order of its directors or resident manager (*q*); and that an ordinary joint-stock company cannot escape liability for *292 *goods *bonâ fide* supplied to it for the purposes of its business, and by the orders of the superintendent of its works, simply because he may not have been appointed in strict conformity with the company's deed of settlement. (*s*) So a company is liable to pay for goods which it has power to buy, and which have been ordered in its name by its agents, although not for its use. (*t*) But the mere circumstance that goods have been supplied to a company in the course of its trade, and have been used by it, is not sufficient to render the company liable for them if they were supplied by the order of persons not authorized to obtain them for the company. (*u*) In such a case ratification by the company must be proved. (*x*) A company has implied power to purchase a patent which is useful to it for the purpose of carrying on its business. (*y*) But a company has no implied power to buy its own shares, nor is such a power included in a general power to deal in shares. (*z*)

running to both, but without the knowledge or assent of the other partner. The transaction was wholly out of the line of the business of the partnership, and known to be so by the payees. Afterwards, both partners joined in a bond to convey the same land, the partner not assenting to the said conveyance, disclaiming in the bond any interest in the land, and declaring the execution of the bond to be for the benefit of his copartner, and that he would receive none of the profits arising from the transaction: *Held*, that he had so confirmed the doings of his partner as to be holden on the note. Dudley *v.* Littlefield, 21 Me. 418.

(*p*) De Tastet *v.* Carroll, 1 Stark. 88.

(*q*) Newton *v.* Daly, 1 Fos. & Fin. 26; Tredwen *v.* Bourne, 6 M. & W. 461; Hawken *v.* Bourne, 8 ib. 703. As to Vice *v.* Anson, 7 B. & C. 409, see the above cases, and Owen *v.* Van Uster, 10 C. B. 318.

(*s*) Smith *v.* Hull Glass Co., 11 C. B. 897; Allard *v.* Bourne, 15 C. B. N. S. 468.

(*t*) Ebbw. Vale Co. 8 Eq. 14.

(*u*) Kingsbridge Flour Mill Co. *v.* Plymouth Grinding Co. 2 Ex. 718.

(*x*) As to which, see *ante*, p. 258.

(*y*) Leifchild's case, 1 Eq. 231.

(*z*) Zulueta's claim, 5 Ch. 444; and see *ante*, p. 290, note. (*h*)

General powers of management do not include a power to purchase the business of another company (*a*); but whether such a power can be conferred on directors by a meeting of shareholders has been much discussed, and is scarcely yet settled. Such a purchase generally involves the assumption by the purchasing company of the debts and liabilities of the selling company, and it is difficult to hold that a transaction of this kind is one as to which a majority ought to be able to bind a minority. (*b*) The amalgamation of insurance *companies is now governed by 33 & 34 Vict. c. 61, and 34 & 35 Vict. c. 58. *293

Purchase of business and amalgamation of companies.

27. *Receipts.*—See *ante*, under the head of *Debts.* 27. Receipts.

28. *Releases, &c.*—A covenant by one partner not to sue for a partnership debt does not amount to a release of that debt by the firm (*c*), although a covenant by all the partners not to sue would be equivalent to a release (*d*), and a release by one partner operates as a release by the firm. (*e*)[1]

28. Releases and covenants not to sue.

(*a*) Ernest *v.* Nicholls, 6 H. L. C. 401, and see the next note.

(*b*) Compare upon this subject the judgments of V.-C. Wood, and L. J. Turner, in the case of the Era Assurance Soc. 2 J. & H. 400 and 408; 1 DeG. J. & Sm. 29, and 1 Hem. & M. 672. See, also, Kearns *v.* Leaf, and Aldebert *v.* Kearns, 1 Hem. & M. 681. In *Ex parte* Bagshaw, 4 Eq. 341; Anglo-Australian Assurance Co. *v.* British Prov. Life, &c. Soc. 3 Giff. 521, and 4 DeG. F. & J. 341; the power to purchase was conferred by the deed of settlement. But even an express power to amalgamate does not enable directors to force their own shareholders to take shares in another company; Higg's case, 2 Hem. & M. 657; *Ex parte* Bagshaw, 4 Eq. 341, and see as to the construction of such powers, Stace and Worth's case, 4 Ch. 682; Bank of Hindustan *v.* Alison, L. R. 6 C. P. 54, and 9 Ch. 1.

(*c*) Walmsley *v.* Cooper, 11 A. & E. 216.

(*d*) Deux *v.* Jefferies, Cro. El. 352.

(*e*) 2 Ro. Ab. Release, 410 D.; Hawkshaw *v.* Parkins, 2 Swanst. 539.

[1] A release of errors by one partner will bind his co-partner. Wood *v.* Goss, 21 Ill. 604.

An agreement between partners, on dissolution, that one shall have the settlement of their affairs, he assuming all the debts of the firm, and agreeing to pay to the outgoing partner all the money contributed by him, except what he had before drawn out, operates as an assignment of the debts due the firm to the remaining partner; and a subsequent release of a debt due the firm by the outgoing partner to a creditor having notice of the agreement is void. Cram *v.* Cadwell, 5 Cow. 489. See, also, Lunt *v.* Stevens, 24 Me. 534; also, *ante*, 278, note.

A release of liability upon a contract of warranty, executed by one partner in the name of the firm after he had sold his interest in the machine warranted, is not admissible to bind the other partner. Brayley *v.* Goff, 40 Iowa, 76.

Setting aside bona fide releases by one partner.

This last proposition, viz., that a release by one partner is in point of law a release by all, is strongly illustrated by those cases in which attempts have been unsuccessfully made by one partner to set aside a release given by a co-partner without his consent.

Furnival v. Weston.

In Furnival *v.* Weston (*f*) the members of a firm sued the defendant for a libel on the firm published by him. One of the partners, without the consent of the others, released the defendant, and there being no fraud in the case the court refused to set the release aside. In Arton *v.* Booth (*g*), the two plaintiffs Arton and Dawson had been partners, but they had dissolved partnership, and it was agreed between them that Arton should get in the debts of the firm, and that Dawson should not interfere with him. The defendant was sued for a debt owing to the plaintiffs, and after action brought Dawson released him on receiving payment. Although the release deprived the plaintiffs of their costs, the court would not interfere, as no case of fraud was made out. So in Phillips *v.* Clagett (*h*), where partners brought an action against the defendant for illegally pledging their property, the court gave him leave to plead a release previously given by one of the partners.

Arton v. Booth.

Phillips v. Clagett.

Setting aside fraudulent releases.

However, if it can be shown that one partner has in fraud of his co-partners and in collusion with the defendant executed a *release for the purpose of preventing them from enforcing a just demand, the defendant will not be allowed to plead this release as a defense to an action against him. Thus in Barker *v.* Richardson (*i*), the plaintiffs Barker & Owen had been partners, but they had dissolved partnership, and it was agreed that Barker should get in the debts owing to the firm, and if necessary sue for the same. The defendant was indebted to the firm and had notice of the above agreement. He was also a creditor of Owen on a private account, and Owen, against Barker's consent, gave a receipt for the partnership debt, and after the commencement of the action by Barker for the recovery of that debt, gave the defendant a for-

*294

Barker v. Richardson.

(*f*) 7 Moore, 356.

(*g*) 4 Moore, 192. See, too, Jones *v.* Herbert, 7 Taunt. 421, and compare Barker *v.* Richardson, 1 Y. and J. 362, stated lower down.

(*h*) 11 M. & W. 84.

(*i*) 1 Y. & J. 362. See, too, Aspinall *v.* The London and N. W. Rail. Co. 11 Ha. 325; Phillips *v.* Clagett, 11 M. & W. 84.

mal release. The evidence showed that the release was given to defeat the action, to prevent Barker from recovering the debt due to the firm, and as part of a scheme for discharging Owen's private debt to the defendant. Under these circumstances the release was not allowed to be pleaded.[1]

29. *Representations.*—The firm is bound by all representations made by a partner whilst acting within the scope of his implied authority, and having reference to the business of the firm (*k*);[2] but not by statements made

29. Representations and statements.

[1] A canal company owed G. & K., for work and materials on an aqueduct, $76,589.89, and $16,250.50 for preliminary work on the same. The company secretly obtained from K. a release of all G. & K.'s claims against it for $2,000 cash, and $3,000 more in the company's stock at par: *Held*, that this release was void, it being a gross fraud on its face. South Fork Canal Co. *v.* Gordon, 6 Wall. 561. See *ante*, 293, note.

(*k*) Rapp *v.* Latham, 2 B. & A. 795; Blair *v.* Bromley, 2 Ph. 354; Wickham *v.* Wickham, 2 K. & J. 478.

[2] See Stockwell *v.* Dillingham, 50 Me. 442; McKee *v.* Hamilton, 33 Ohio St. 7; and the cases cited below; also, *Admissions and Declarations*, *ante*, 264, note.

The general rule that, where one makes a statement as received from another, and refers directly to that other, the former is not bound for the truth of the facts thus stated, is not applicable to the case of partners who are responsible for each other's statements in regard to their joint transactions. Cook *v.* Castner, 9 Cush. 266.

A partner sold certain promissory notes belonging to the firm for the benefit of the firm, stating to the purchaser that they were good notes and would be paid, that the indorser was worth a certain sum, and the maker another certain sum, which representations were false: *Held*, that the firm were bound by the representations of the partner, and an action on the warranty might be maintained against all the members. Sweet *v.* Bradley 24 Barb. 549

Representations by a member of a firm, to the payees and indorsees of notes of the firm, without knowledge that the notes were tainted with usury, that the debt represented by the notes was all right, and would be promptly paid, are binding on the firm, and estop them from setting up usury in defense to a suit on the notes. French *v.* Rowe, 15 Iowa, 563.

One of a firm of warehousemen falsely represented to a person who advanced money on the faith of such representation, that the one to whom the money was advanced, and to whom he had given receipts in the firm name, had on storage with the firm a certain quantity of grain. The innocent partners were *held* bound by the representation, and responsible for the money advanced. Griswold *v.* Haven, 25 N. Y. 595.

Where one of a firm makes representations that certain flour was bought on account of a third person, and that the firm's interest is limited by the amount advanced by them in making the purchase, the firm cannot assert their ownership as against one who has purchased of said third person. Bemis *v.* Becker, 1 Kan. 226.

Where one of two partners makes fraudulent representations, whereby goods are obtained and consigned to his partner, replevin in the *cepit* lies against both. Olmsted *v.* Hotailing, 1 Hill, 317.

by him as to his authority to do that which the nature of the business of the firm does not impliedly warrant. (*l*)[s] A joint stock company is not bound by the statements of one of its members, unless he is also the agent of the company, and his statements relate to matters within the scope of his agency. (*m*) Nor is a company bound by statements made by one of its directors, if he is not singly an agent of the company. (*n*) But a company is bound by the statements of its directors, if made by them for the company and in the course of the business which it is their duty to transact. (*o*)

*295 *The liability of partnerships and companies for false and fraudulent representations will be discussed in the next section of this chapter.

See further on this subject *ante*, under the head *Admissions*.

30. Sales. 30. *Sales.*—Any partner can dispose of any of the partnership goods (*p*)[1]; and in one case it was even held that he could make a valid sale of the partnership books. (*q*)

(*l*) *Ex parte* Agace, 2 Cox, 312.

[s] See *ante*, 264, note.

(*m*) Burnes *v.* Pennell, 2 H. L. C. 497, *ante*, p. 243.

(*n*) Holt's case, 22 Beav. 48; Gibson's case, 2 DeG. & J. 275; Nicol's case, 3 DeG. & J. 387.

(*o*) See the National Exchange Co. of Glasgow *v.* Drew, 2 M'Queen, 103; Meux's Ex. case, 2 DeG. M. & G. 522.

(*p*) Lambert's case, Godb. 244.

(*q*) Dore *v.* Wilkinson, 2 Stark. 287.

[1] One partner may sell the whole of the partnership property, if the sale be free from fraud on the part of the purchaser; and such sale dissolves the partnership, although the term for which it was formed has not expired. Whitton *v.* Smith, 1 Freem. Ch. 231; Deckard's case, 5 Watts, 22; Arnold *v.* Brown, 24 Pick. 89; Williams *v.* Barnett, 10 Kan. 455; Hyrschfelder *v.* Keyser, 59 Ala. 338; Williams *v.* Roberts, 6 Coldw. 493. See, however, Kimball *v.* Hamilton, etc. Ins. Co. 8 Bosw. 495.

In the absence of fraud, one member of a firm may, notwithstanding the protest of his partner, transfer all the property of the partnership, in consideration of the promise of the purchaser to pay its debts, though not yet due. Graser *v.* Stellwagen, 25 N. Y. 315.

But a sale of all the partnership property by one of the partners against the prohibition of the other partner, is suspicious; and the purchasers at such a sale, with knowledge of the circumstances, purchase it at their peril. Williams *v.* Roberts, 6 Cold. 493.

The mere fact that one member of an ordinary planting partnership is entrusted with the management of the plantation in Louisiana, will not authorize him to make a *dation en paiement* of certain property of the partnership to one of the partnership creditors, and thus place the interest of his co-partner in said property beyond the reach of the other creditors of the partnership. Bass *v.* Messick, 30 La. An. 373.

The active partner of a mercantile partnership may transfer its funds. Piatt *v.* Oliver, 3 McLean, 27.

The appropriation of the partnership funds by the active partner, to the rebuilding of a house for purposes of

If by any event the partners become mere tenants in common of the partnership goods and one assumes to sell them, the purchaser, although he may only become tenant in common with the other partners, will, nevertheless, if he gets possession of the goods,

speculation, transcends the range of partnership transactions, and unless sanctioned by the co-partner, the funds so expended would be properly charged to the active partner, as so much appropiated to his private use, and the rents of the house would belong to him, otherwise the rents would be accounted for as partnership assets. Roberts *v.* Totten, 13 Ark. 609.

Upon a bill to reach property of a debtor, the fact that certain stock which he had in a canal company was partnership property, in which another person was interested, and that the stockholders were personally liable for the debts of the company, was *held* to be no objection to granting an injunction to restrain him from parting with it. Eager *v.* Price, 2 Paige, 333.

If A be a silent partner with B, he is the only person who can object to the validity of a sale by B alone, of goods owned in common by them as partners. Derby *v.* Gallup, 5 Minn. 119.

One partner cannot maintain an action of any kind against a person who purchases from a co-partner the partnership effects, though such sale was made by the co-partner, in fraud of the partnership rights, and to satisfy his own individual debt. Wells *v.* Mitchell, 1 Ired. L. 484.

One partner cannot sell or mortgage, his undivided interest in a specific part of the property belonging to the partnership. Lovejoy *v.* Bowers, 11 N. H. 404.

A member of a co-partnership sold and assigned to another "all his interest in and to the property, goods, wares and merchandise, and debts belonging to the firm:" *Held*, that a debt owing by himself to the firm did not pass by the assignment, the interest of the assignor being only what remained over and above the amount of his indebtedness to the firm. Van Scoter *v.* Lefferts, 11. Barb. 140.

The mere fact that persons are mercantile partners does not empower one of them to execute an agreement for the sale of real estate in the name of both. McWhorter *v.* McMahan, 1 Clark, 400.

While it is competent for one partner to bind the other by a sale of the good will of the business, it is out of his power to bind his partner, by a contract, not to go into the same business. Morean *v.* Edwards, 2 Tenn. Ch. 347.

Although one partner can transfer the property of the firm to its creditors in discharge of its indebtedness, he cannot apply the partnership property funds or secureties to the discharge of his own private debt without the consent of the other partners, either express or implied. Caldwell *v.* Scott, 54 N. H. 414; Hyrschfelder *v.* Keyser, 59 Ala. 338; Stegall *v.* Coney, 49 Miss. 761; Geery *v.* Cockroft, 33 N. Y. Superior Ct. 147; Williams *v.* Barnett, 10 Kan. 455; Post *v.* Kimberly, 9 John. 470. See, also, *ante*, 277, note.

The rule that a partner cannot, without his co-partner's consent, appropriate the firm property to the payment of his individual debts, is not affected by the fact either of the creditor's knowledge or ignorance of the partnership ownership. Geery *v.* Cockroft, *supra;* Rogers *v.* Batchelor, 12 Pet. 221; Ackles *v.* Stockle, 56 Mo. 558. See, however, Flannagan *v.* Alexander, 50 Mo. 50.

be able to retain them as against his co-tenants; for no action lies by one tenant in common against another for the recovery of the goods belonging to both. (*r*)

The question whether a partner's power to sell is in any way affected by the Factors' Acts has already been noticed. (*s*)

Sales by companies.

With respect to sales by companies, the main points to be borne in mind are:—

1. Corporate bodies have by common law full power to sell their own corporate property. (*t*)

If, however, one partner purchases property with the partnership effects, and sells such property to a *bonâ fide* purchaser without notice, the other partners, it is held, cannot follow the property in the hands of such purchaser. Chipley *v.* Keaton, 65 N. C. 534.

One who, in ignorance of a co-partnership, takes in payment of the individual note of a member given for his private debt, notes of third parties running to such member, but in fact the property of the co-partnership, will be protected as a *bonâ fide* holder for value. Kellogg *v.* Fancher, 23 Wis. 21. See, also, Nichols *v.* Sober, 38 Mich. 678; *ante*, 266, note.

Where a partner, who is authorized to close up the affairs of the firm, and who has advanced his private funds in payment of its debts, in good faith disposes of property of the firm to an amount less than the sum so due him, and in satisfaction of a debt due from him to a third person acting in like good faith, and believing the sale authorized by the firm, such disposition of the property cannot be avoided by another member of the firm, so long as all the other debts of the firm are paid or secured. Corwin *v.* Suydam, 24 Ohio St. 209.

One partner acting in good faith, sold the partnership property to satisfy his individual indebtedness, and an action of replevin was brought by the purchaser against a creditor of the firm who had attached the property, after the sale and delivery, as the firm property, and for a firm debt: *Held*, that the right of the purchaser was superior. Stokes *v.* Stevens, 40 Cal. 391.

A sale by a partner, in payment of his own debt, of goods which are in fact goods of the partnership, but which the partnership has so entrusted to him as to enable him to deal with as his own, and to induce the public to believe to be his, and which the creditor receives in good faith and without notice that they are the goods of the partnership, is valid against the partnership and its creditors. Locke *v.* Lewis, 124 Mass. 1.

A partner cannot appropriate the partnership effects to the payment of his individual debts; but he may say to a hotel-keeper, "buy your groceries of us, and we will take it out in whole or in part, in the board, either of ourselves or of our clerks;" and this contract will bind the firm. Perry *v.* Butt, 14 Ga. 699.

On the failure of a partnership, an appropriation of the joint property by one partner to pay his individual debt, is fraudulent and void as against the partnership creditors. Yale *v.* Yale, 13

(*r*) Litt. § 323; Fox *v.* Hanbury, Cowp. 445; and see Buckley *v.* Barber, 6 Ex. 182.

(*s*) *Ante*, p. 285.

(*t*) Mayor, &c., of Colchester *v.* Lowten, 1 V. & B. 226; Evan *v.* Corporation of Avon, 29 Beav. 144. See, also, Patent File Co. 6 Ch. 83.

2. Railway and other companies governed by special acts of Parliament conferring upon them rights and privileges which they would not otherwise enjoy, cannot delegate or transfer those rights and privileges to other persons. (*u*)

3. Although general powers of management necessarily include

Conn. 185; French *v.* Lovejoy, 12 N. H. 458.

A partner cannot appropriate partnership assets on the ground of indebtedness of the partnership to himself, without assent of the co-partners. Saylor *v.* Mockbie, 9 Iowa, 209.

A *bonâ fide* sale of partnership property for the benefit of the partnership, is good as against a mortgage of the same property by one of the partners to secure an individual debt. Shaw *v.* McDonald, 21 Ga. 395.

If a partner buys a chattel for his private use, and agrees to pay for it in goods to be delivered by his firm on the order of the seller, and the firm is changed by the addition of a new member, but continues the business of the old firm in the old place, and subsequently the goods are delivered according to the agreement, the firm cannot maintain an action for the price of the goods, though the other members of the firm were ignorant of the agreement. Tay *v.* Ladd, 15 Gray, 296.

Where one member of a firm received stolen property, knowing that such property had been stolen, and in order to prevent a prosecution for the felony, he paid the value of the stolen goods out of the partnership funds, unknown to his co-partner: *Held*, that the innocent co-partner could not maintain an action against the person receiving the money, to recover such money back. He was effected by the act of his co-plaintiff in the suit. Johnson *v.* Byerly, 3 Head, 194.

If a partner sells goods, it raises an implied promise on the part of the vendee to pay the partnership for them, subject, however, to be controlled by any express contract which may have been made between the vendee and all the partners, that the former was not to pay the partnership, but to credit the amount of the goods on an individual claim against the partner who sold the goods, in favor of the vendee. Broaddus *v.* Evans, 63 N. C. 633; Ramey *v.* McBride, 4 Strobh. 12.

As to the proper remedy, where one has applied partnership funds and effects to the payment of his individual debt, without his partner's consent, see Viles *v.* Bangs, 36 Wis. 131; Estabrook *v.* Messersmith, 18 id. 545.

A forced sale by one partner of the property of the firm, not in the course of its business, confers no title on the purchaser who buys with notice of the nature of the transaction. Wallace *v.* Yeager, 4 Phil. 251.

A stipulation in partnership articles, that the farm produce of the partnership business is all to be sent to certain factors, and held till sold by consent of all the partners, will affect whoever has notice of the same; and a sale by one partner, in violation of the stipulation, will pass to a purchaser having such notice no title as against the partnership. And proceeds of partnership property realized by the plaintiffs by a wrongful sale by them of such property, are not the subject of set-off in favor of some of the partners in a suit at law against them only, without bringing in the other partner as a party, and al-

(*u*) See Winch *v.* Birkenhead Rail. Co. 5 DeG. & Sm. 562, and other cases of that class, *ante*, 284, note (*t*).

power to sell in the ordinary course of business, such powers do not authorize sales of an unusual description, *e. g.*, a sale of the business of the company. (*x*)

But there is a distinction between selling the business of *296 a *company as a whole and selling the specific goods and chattels of the company. This is well illustrated by the case of Wilson v. Miers. (*y*) There a steamship company, being the reverse of prosperous, its directors entered into a contract for the sale of its whole fleet. The purchaser

Wilson v. Miers.

leging all the equitable facts requisite to entitle the defendants to the relief they claim. Radcliffe *v.* Varner, 55 Ga. 427.

Where a member of a firm of dealers in dry goods sold a judgment in favor of the firm for corn: *Held*, that this was a misapplication of the effects of the partnership; that the purchaser was chargeable with a knowledge of the fact; and that, by his contract, he took no right to receive the proceeds of the judgment. Vance *v.* Campbell, 8 Humph. 524.

L. W. & B. were partners dealing in cattle. L. on behalf of the firm, sold some eighty head to F., who knew of the partnership, and had had dealings with it. B. claimed to have purchased the cattle from his firm some months prior to the sale to F.: *Held* that if there was no change in the possession or control of the cattle at the time of B.'s purchase, and if F., without any knowledge of such prior purchase, or of any facts calculated to arouse suspicion and put him on inquiry, and finding the cattle in the possession of the firm, bought in good faith for a valuable consideration, and in the ordinary course of business, his title would be good against B. and that, notwithstanding the latter's purchase was also in good faith, and for a valuable consideration. Such case is determined by the laws of partnership rather than by the provision of the statute of frauds. Birks *v.* French, 21 Kans. 238.

Subsequently to the time of B.'s purchase, but prior to that of F., L., on behalf of the firm turned the cattle over to F., under a feeding contract, by the terms of which the latter was to take the cattle to a certain place and there feed them until the succeeding July; then the cattle were to be sold, a certain sum to be paid to the firm, and the balance, if any, divided between the firm and F., and T. was not to remove or dispose of the cattle without the consent of the firm. This contract was assigned by L. for the firm to F. at the time of his purchase. Subsequently, but before July, B. took the cattle from T. under a writ of replevin. Thereafter he settled with T. paying him his charges for feeding, and the latter sold his interest in the cattle. After this, F. brought this action against B. to recover the possession of the cattle: *Held*, that F. could maintain the action and was entitled to the possession, and that any adverse rights of possession created by the feeding contract were destroyed by the transactions between B. & T. Birks *v.* French, *supra*.

(*x*) See Ernest *v.* Nicholls, 6 H. L. C. 401, and the cases cited, *ante*, p. 292, note (*b*). See, also, Chapple *v.* Cadell, Jac. 537, *infra*, note (*a*).

(*y*) 10 C. B. N. S. 348.

declined to complete the contract, on the ground that, although the directors had general powers of management, including power to buy and sell ships, they could not, in the absence of a resolution to dissolve the company, sell off all its ships at once. The Court of Common Pleas, however, held that the contract was one which the directors could lawfully enter into and carry out without any special authority from the shareholders.

4. A power to sell the assets of a company as a whole when it is being wound up is conferred by the Companies Act, 1862 (*z*); and independently of that act, where there is power to wind up, there must necessarily be a power to sell and convert into money. (*a*)

31. *Servants.*—One partner has implied authority to hire servants to perform the business of the partnership (*b*), and the writer presumes that one partner has also implied authority to discharge them, although he cannot do so against the will of his co-partners. (*c*)[1] 31. Servants.

As to the appointment of servants by companies, see *ante*, p. 246.

32. *Shares.*—See *Mortgages and Pledges—Purchases—Sales.* 32. Shares.

(*z*) See § 161, and Higg's case, 2 Hem. & M. 657; Clinch *v.* Financial Corp., 5 Eq. 450, and 4 Ch. 117; Imperial Bank of China, &c. *v.* Bank of Hindustan, 6 Eq. 91.

(*a*) See Lord *v.* Copper Miners' Co. 2 Ph. 740. Compare Chapple *v.* Cadell, Jac. 537, where it was held that the majority of the proprietors of a newspaper could only sell their own shares.

(*b*) Beckham *v.* Drake, 9 M. & W. 79. A servant of the firm is a servant of each of the partners, and may be described accordingly in an indictment for stealing the separate property of one of the partners. R. *v.* Leech, 3 Stark. 70.

(*c*) Donaldson *v.* Williams, 1 Cr. & M. 345. But see Dixon on Part. 139, *contra*.

[1] Where an agreement was made in writing by one partner, signing the name of the firm, in which it was agreed that the firm should pay to the brother of the partner making the agreement, a salary for services to be rendered by him; and the evidence showed that the party thus employed was unfit to discharge the duties imposed on him by the agreement, and that the agreement was kept from the knowledge of the other partners: *Held*, that under such circumstances, no effect should be given to the agreement as an evidence of indebtedness against the creditors of the partnership. Beste *v.* Creditors, 15 La. Ann. 55.

Three partners took a nephew ten years old; he lived with them seventeen years and worked for them; they agreed to pay him wages all the time he stayed with them. After the death of one partner, the survivors settled with the nephew and paid him what they thought due: *Held*, that the facts constituted a valid contract, and that the estate of the deceased partner was liable for a

33. *Ships.*—Where necessary, one partner may bind the firm by chartering a ship on its behalf, and one partner may mortgage a ship belonging to the firm. (*d*)

33. Ships.

*297 *As to mortgages and sales of ships by companies, see *ante*, under the head *Mortgages* and *Sales*.

[33 *a. Storage of Firm Property.*][1]

34. *Transfer of business.*—As to the right of companies to delegate their powers and transfer their businesses, see *ante*, under the heads *Lease* and *Sale*.

34. Transfer of business.

SECTION IV.—LIABILITY OF PARTNERSHIPS AND COMPANIES IN RESPECT OF TORTS AND FRAUDS.

Liability of principals for the torts and frauds of their agents.

If it were necessary, in order that one person should be liable for the tort or fraud of another, that the former should have authorized the commission of such tort or fraud, it would be a comparatively easy matter to determine in any particular case whether a tort or fraud committed by an agent could or could not be imputed to his principal. But as a principal is bound, not only by the authorized acts of his agent, but also by such unauthorized acts as fall within the scope of the authority apparently conferred upon him, the question whether a tort or fraud committed by an agent is or is not imputable to his principal becomes one of considerable difficulty; for it is obvious

third of the amount. Moister's appeal, 74 Pa. St. 166.

If agents of an unincorporated joint stock company, acting within the scope of their employment, hire a mechanic to do work for the company, its members, as partners, are liable to him for his work, although they did not know by whom the work was done, nor exactly what was to be done, and as between themselves their articles of association had not been complied with, and those articles gave no authority in terms to anybody to incur a debt for the company. Bodwell *v.* Eastman, 106 Mass. 525.

(*d*) See as to chartering, Thomas *v.* Clarke, 2 Stark. 451, and as to mortgaging, *Ex parte* Howden, 2 M. D. & D. 574. The circumstance that a person is registered as a part owner, does not, *per se*, render him liable for the acts of the other owners. Myers *v.* Willis, 17 C. B. 77, and 18 ib. 886; Brodie *v.* Howard, 17 C. B. 109.

[1] The storage in a warehouse by one partner, without the consent of the others, of partnership goods as his own individual property, will not change the right of possession or title of the partnership, the possession of one being the possession of all, and either may receive the goods and discharge the bailee. Crosswell *v.* Lehmann, 54 Ala. 363.

that it does not follow from the circumstance that such tort or fraud was not authorized, that therefore the principal is not legally responsible for it. (*e*)

General principles.

In order that responsibility may attach to the principal, in respect of a tort or fraud, it is necessary—

1. That he shall have authorized it in the first instance;[3] or,
2. That he shall have made it his own by adoption;[3] or,
3. That it shall have been committed by the agent in the course and as part of his employment. (*f*)[4]

That this last is sufficient is obvious from those cases in which masters have been held liable for the negligence of their *servants (*g*); litigants for irregularities committed by their *298 solicitors in the course of the litigation to conduct which they are retained (*h*); merchants for frauds committed by their factors and brokers whilst acting on their behalf (*i*); and shopkeepers for the illegal acts of their shopmen whilst in the shop and attending to its business. (*k*)

Exceptions to the rule respondeat superior.

On the other hand, a principal is not liable for the torts or frauds of his agent, except upon one or other of the three above-mentioned grounds. Thus, a principal is not liable for the willful acts of his agent, if not done in the course of his em-

(*e*) Story on Agency, § 452; Paley on Agency, 294, *et seq.*

[3] See *post*, 299, note.

[3] The assent of one of two partners to what is being done by a person acting as a deputized constable in the service of an execution in favor of the firm, is sufficient to bind them both. Harvey *v.* McAdams, 32 Mich. 472.

Where one partner of a firm acting as agents for the owner of demised property, committed a trespass in expelling the tenant and removing his goods from the premises: *Held*, that the other partner, who took no part in the act and knew nothing of it at the time, and neither advised nor directed it, could not be rendered liable on the mere ground of his subsequent approval and sanctioning of the act after its commission. Grund *v.* Van Vleck, 69 Ill. 478.

Where one partner has an attachment made on account of a firm debt, and the goods are afterwards sold under an execution in the same suit, and the proceeds are applied to meet the debt, this is proof of a ratification of the attachment by all the partners; and if it be wrongful, they will all be liable in an action of tort. Gurler *v.* Wood, 16 N. H. 539.

See *post*, 299, note.

(*f*) As to the meaning of this expression, see Burns *v.* Poulson, L. R. 8 C. P. 563.

[4] See generally, Ewell's Evans on Agency *465 *et seq.*; *post* 299, note.

(*g*) See the last case, and Patten *v.* Rea, 2 C. B. 606.

(*h*) Collett *v.* Foster, 2 H. & N. 356.

(*i*) Hern *v.* Nichols, 1 Salk. 289.

(*k*) Grammar *v.* Nixon, 1 Str. 653; Amory *v.* Delamirie, ib. 505.

ployment and as part of his business;[1] (*l*) and this is true not only of assaults, batteries, libels, and the like, but also of frauds. The maxim *respondeat superior* does not render a principal liable for the frauds of his agent, unless they have been committed by the agent for the benefit of his principal, and in the course and as part of his own employment. (*m*)

Further, a principal is not bound by a contract which is a fraud on him, and is known so to be by the person entering into the contract. This rule is peculiarly applicable to contracts entered into by directors on behalf of companies. (*n*)

Having made these preliminary observations, it is proposed, in the present section, to examine the liability of partners and companies for torts and frauds, as distinguished from contracts.

First as regards torts.

Torts of partners.

It follows from the principles of agency, coupled with the doctrine that each partner is the agent of the firm, for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the *299 negligence of *any one of its members in conducting the business of the partnership.[1] It has accordingly been held that a firm of coach proprietors is answerable for the negligent

(*l*) McManus *v.* Crickett, 1 East, 106; Croft *v.* Alison, 4 B. & A. 590; A. G. *v.* Siddon, 1 Cr. & J. 220. Compare Limpus *v.* Lon. Gen. Om. Co. 1 H. & C. 526.

[1] See Cooley on Torts, 535, 536; Ewell's Evans on Agency, *480, and note.

(*m*) Grant *v.* Norway, 10 C. B. 665; Coleman *v.* Riches, 16 ib. 104.

(*n*) British and American Tel. Co. *v.* Albion Bank, L. R. 7 Ex. 119; Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43, and see, as to the effect of having benefited by such a contract, ib. p. 55.

[1] The members of a firm are individually liable in actions of tort for the acts of the firm, their agents and servants, and for such acts may be sued individually. Stockton *v.* Frey, 4 Gill, 406.

A tort committed by one partner wil not bind the partnership or the other co-partner, unless it be either authorized or adopted by the firm, or be within the proper scope and business of the partnership. Graham *v.* Meger, 4 Blatchf. 129; Heirn *v.* McCaughan, 32 Miss. 17; Taylor *v.* Jones, 42 N. H. 25.

Partners are liable *in solido* for the torts of one of their number, if committed by him in the course of the business of the partnership; but if a partner commit a tort, not as a partner, but as an individual, in respect to a matter entirely foreign to the business of the partnership, the other partners are not liable. Schwabacker *v.* Riddle, 84 Ill. 517.

Where, therefore, one partner induces a stranger to purchase the interest of

driving of a partnership coach by one of the firm, the coach being driven for the firm in the ordinary course of business (*o*); and that

the other partners in the firm business, by fraudulent representations, the parties selling are not liable for such false representations, unless they instigate or approve them, or the partner making them is acting as their agent in making them. The mere fact of their relation as partners will not make them liable. Schwabacker *v.* Riddle, *sup.*

All the members of a partnership are liable for an injury occasioned by the negligence of one of them, or of servants employed by the partnership while transacting business of the firm. Linton *v.* Hurley, 14 Gray, 191.

Thus, the owner of a horse borrowed by a partner to be used in the firm business, and lost through his neglect, or other wrong doing, may recover therefor against the partnership. Witcher *v.* Brewer, 49 Ala. 119.

An action was brought against B. as surviving partner of the firm of B. & C., and it was shown that each of the partners was engaged in separate business on his own account besides the business of the firms. C. being about to go to San Francisco to purchase goods for the firm, R. delivered to him a package of United States treasury notes and securities. On his way to that city C. lost his life. Afterward R. tried to collect his claim from C.'s estate. It did not appear what had become of the notes and securities after their delivery to C: *Held*, that the evidence was too meagre to justify the conclusion that B. was chargeable as a co-partner of C. Roney *v.* Buckland, 5 Nev. 219.

The direction to levy execution upon a particular subject, being an incident to the obtaining payment of the legal process, when a partner gives such direction while acting in the collection of a debt due the partnership, the presumption is that he had the countenance and assent of the other partner; and both are presumptively liable for the trespass, if the levy is wrongful. Chambers *v.* Clearwater, 1 Abb. App. Dec. 341.

It is not necessary there should be a joint conversion in fact in order to implicate all the partners, as such a conversion may arise by construction of law. An assent by some of the partners to a conversion by the others will make them wrong-doers equally with the rest, provided the conversion was for their use and benefit, and that they were in a situation to have originally commanded the conversions. Loomis *v.* Barker, 69 Ill. 360.

Where one partner placed a claim in the hands of a constable for collection, and under which property of a stranger to the process was seized and sold under attachment or execution, and the other partner was present at the sale, and bid on the property, and treated and spoke of the property as having been taken and sold on the process issued upon a claim due the firm, and he received the proceeds of the sale as a payment on such claim: *Held*, in an action of trover by the owner against the partners, that they were both liable for the conversion. Loomis *v.* Barker, 69 Ill. 360.

If a member of a firm, in the due course of business of the partnership, commits a tort by seizing and taking the property of another, and the same is appropriated to the use and benefit of the firm, thereby increasing its assets, the other partners will be liable for the same. Durant *v.* Rogers, 87 Ill. 508.

If a firm acting through an agent or one of the partners, while engaged in the regular course of the business of the firm, innocently or wrongfully appro-

(*o*) Moreton *v.* Hardern, 4 B. & C. 223.

two partners are liable for not keeping a shaft of a mine in proper order, although one of them only actually superintended it. (*p*) So, a partnership is liable for the negligence of its servants acting in the course of their employment by the firm (*q*);[a] and if one partner, in conducting the business of the firm, is guilty of a breach of the revenue laws, all the partners are jointly and severally answerable for the consequent penalties, although they may not have authorized or been parties to the illegal conduct of their co-partner. (*r*)[b]

priates chattels, other than money, or what has the quality of money, and sells them and receives and uses in its business the proceeds, or, without a sale, uses them in the firm's business, the firm is liable for conversion; and it is wholly immaterial that all or any of the members of the firm were ignorant of the wrong committed, or innocent of any wrongful intent. *In re* Ketchum, 1 Fed. Rep. 815.

The firm is liable for the misappropriation of money under such circumstances, where the innocent partner on the facts proved appears to have no equity to avail himself of the payment of the money to the firm, as a payment between himself and his co-partner, of money in settlement or adjustment of any balance due to him, on account of the partnership business, or as a payment of money to him upon any consideration whatever, in receiving which he relied upon his co-partner's possession as proof of ownership, where, by reasonable inquiry, such innocent partner could have discovered the source from which the misappropriated money came. *In re* Ketchum, 1 Fed. Rep. 815.

A partner, innocent in fact, may be charged for a conversion by his co-partners, in the regular line of firm business, the profits and commissions thereon having gone to the firm account. Castle *v.* Bullard, 23 How. 172. See, also, Fletcher *v.* Ingram, 46 Wis. 193.

A conversion by one of a firm to which goods have been sent to be made up, does not excuse the owner from paying the other partners, and therefore he may bring trover against the guilty partner alone. Stevens *v.* Faucet, 24 Ill. 483.

(*p*) Mellors *v.* Shaw, 1 B. & Sm. 437; Ashworth *v.* Stanwix, 7 Jur. N. S. 467. See as to irregular executions of writs by one of two partners, Duke of Brunswick *v.* Sloman, 8 C. B. 317.

(*q*) Stables *v.* Eley, 1 Car. & P. 614.

[a] If a firm of attorneys practicing only in Baltimore, receive a note for collection in Carroll county with the privity of both partners, and they employ an attorney in Carroll county, they are responsible for his default. Brent *v.* Davis, 9 Md. 217.

An action for injuries sustained through the negligence of an employé of a firm, may be brought against any one or more, or all, of its members. Roberts *v.* Johnson, 58 N. Y. 613.

(*r*) R. *v.* Stranyforth, Bunb. 97; A.-G. *v.* Burges, ib. 223; A.-G. v. Weeks, ib.; R. *v.* Manning, Comyn, 616. See A.-G. *v.* Siddon, 1 Cr. & J. 220.

[b] Every partner is civilly liable for violations of the revenue law by his co-partners, whether he knew of, or consented to, such violations or not. United States *v.* Thomasson, 4 Biss. 99.

Partners are jointly and severally liable for the circulation of change-bills by their clerk, in violation of the Ala. Rev. Code, § 3643, although they did not jointly assent thereto, and did not know when the bills were emitted. Barnett *v.* State, 54 Ala. 579.

As a rule, however, the willful tort of one partner is not imputable to the firm.[4] For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable, unless all the members are, in fact, privy to the malicious prosecution. (*s*) Willful torts.

Upon precisely the same principles, companies are liable for the negligence of their servants, and for torts committed by them in the course of their employment,[5] and it never has been admitted, as a sufficient reason for non-liability on the part of the company, that it did not in fact authorize the very act complained of. All that is necessary to charge the company is that the act complained of should be *intra vires*, and not *ultra vires* (*t*), and should be committed by the agent or servant of the company in the course of the business to which it is his duty to attend (*u*). Upon this principle it has been held that the *Bank of England is liable for a wrongful detention of *300 Bank notes by its servants (*x*); that a banking company is liable for the loss of securities entrusted to it and carelessly kept (*y*); that a company is liable for a wrongful seizure of goods made by its servants for non-payment of tolls (*z*); for wrongful arrests (*a*); for negligence in laying down gas-pipes (*b*); for reckless driving Negligence of servants.

Where two persons composing a partnership make and sign, in their partnership name, a false return to the assessor of internal revenue, they may be jointly indicted therefor. United States *v.* McGinnis, 1 Abb. U. S. 120.

[4] See Ewell's Evans on agency *430 and note.

(*s*) Arbuckle *v.* Taylor, 3 Dowl. 160.

[5] See generally as to the liability of corporations for the torts of their agents. Ewell's Evans on Agency, *470, 484, and note.

(*t*) See *ante*. p. 249, and Poulton *v.* L. and S.-W. Rail. Co. L. R. 2 Q. B. 534. As to the liability of the individual members in such cases, see Mill *v.* Hawker, L. R. 9 Ex. 309, and on appeal, 10 ib. 92.

(*u*) See, on this subject generally. Lord Bolingbroke *v.* Local Board of Swindon, L. R. 9 C. P. 575; Mersey Docks Co. *v.* Gibbs, L. R. 1 H. L. 93; Coe *v.* Wise, ib. 1 Q. B. 717; and as to their non-liability for the acts of their directors when not acting as their agents. McGowan & Co. *v.* Dyer, L. R. 8 Q. B. 141.

(*x*) Yarborough *v.* Bank of England, 16 East, 6. See, too, Giles *v.* Taff Vale Rail. Co. 2 E. & B. 822.

(*y*) Johnston's claim, 6 Ch. 212. Compare Giblin *v.* McMullen, L. R. 2 P.C.317.

(*z*) Maund *v.* Monmouthshire Canal Co., 4 Man. & Gr. 452; Smith *v.* Birmingham Gas Co. 1 A. & E. 526.

(*a*) Moore *v.* Metropolitan Rail. Co., L. R. 8 Q. B. 36; Bayley *v.* Manchester and Sheffield Rail. Co. L. R. 8 C. P. 148; Goff *v.* G. Northern Rail. Co. 3 E. & E. 672. Compare Poulton *v.* L. and S. W. Rail. Co. L. R. 2 Q. B. 534. and Eastern Counties Rail. Co. *v.* Broom, 6 Ex. 314.

(*b*) Scott *v.* Mayor of Manchester, 1 H. & N. 59, and 2 ib. 204.

(*c*); for the infringement of a patent by its servants contrary to the orders of its directors (*d*); and for the publication of a libel by transmitting it by telegraph. (*e*) Nor is there any ground for holding that the nature of a corporate body is such that it cannot in point of law be guilty of malicious injury. (*f*) Moreover, in such cases as those now in question, it is not necessary, in order to fasten liability on the company to prove any formal appointment of the agent by the company. (*g*)

It is, however, essential in order that a company may be liable for the wrongful acts of its servants that those acts should be such as the company could have authorized, and that they should *301 have been authorized or ratified by the *company, or have been done by the servants in the course of their employment, and not when acting in matters to which it is not their duty to attend. (*h*) Accordingly it was held that a company was not liable for injuries committed by a dog kept in a yard, there being no evidence to show that the savage nature of the dog was known to any one who had charge of it or to the company's manager, or, in fact, to any one whose knowledge could be considered as the knowledge of the company, although it was proved to be known to one or two of its servants. (*i*)

Forged transfers.

If the officer of a joint-stock company, acting upon the faith of a forged power of attorney, wrongfully but innocently transfers the shares of one of its shareholders, the company is liable to make good the loss (*k*); and an action will lie

(*c*) Green *v.* London General Omnibus Co., 7 C. B. N. S. 290; Limpus *v.* Same, 1 Hurlst. & C. 526.

(*d*) See Betts *v.* De Vitre, 3 Ch. 441.

(*e*) Whitfield *v.* South-Eastern Rail. Co., E. B. & E. 115.

(*f*) See the cases in notes (*c*) and (*e*), which more than remove the doubts expressed in Stevens *v.* Midland Counties Rail. Co., 10 Ex. 352. See, further, as to libels by companies. Lawless *v.* Anglo-Egyptian, &c., Co., L. R. 4 Q. B. 262, where the libel complained of was contained in a report made by the directors to the shareholders, and which was held to be a privileged communication.

(*g*) See Giles *v.* Taff Vale Rail. Co., 2 E. & B. 822.

(*h*) See the cases in the last eight notes. The cases cited in note (*a*) show that a company can ratify and adopt the torts of its agents, if those torts are such as can theoretically be imputed to the company.

(*i*) Styles *v.* Cardiff Steamboat Co. 4 N. R. 483, Q. B.

(*k*) Ashby *v.* Blackwell, 2 Eden. 299, and 1 Amb. 503. Hildyard *v.* The South Sea Co. 2 P. W. 76, cannot be relied upon; see the case last cited, and Davis *v.* The Bank of England, 2 Bing. 393; Bank of Ireland *v.* Evans's Charity Trustees, 5 H. L. C. 389; Orr *v.* Union Bank of Scotland, 1 McQueen, 513.

against the company and the transferee to set aside the transfer, and for an account of the dividends received since the transfer. (*l*) So a company is liable to an action for damages at the instance of a person who has bought shares or advanced money on the faith of a certificate of title issued by a company, although the company may have been induced to issue it by fraud or forgery. (*m*)

Secondly as regards frauds.

An ordinary firm is liable for frauds committed by one of its members whilst acting for the firm, and in transacting its *business; and the innocent partners cannot divest themselves of responsibility on the ground that they never authorized the commission of the fraud.[1] *302 Frauds of partners.

(*l*) Johnston *v.* Renton, 9 Eq. 181; Cottam *v.* Eastern Counties Rail. Co. 1 J. & H. 243; Marsh *v.* Keating, 2 Cl. & Fin. 250, shows tha tthe felony, is no bar to civil proceedings for damages sustained by the transfer.

(*m*) *Re* Bahia and San Francisco Rail. Co. L. R. 3 Q. B. 584; Hart *v.* Frontino, &c. Co. L. R. 5 Ex. 111. Compare Shropshire Union Rail. Co. L. R. 7 H. L. 496, reversing S. C. L. R. 8 Q. B. 420, which turned on the fact that the certificate was true, but only purported to show the legal title.

[1] A fraudulent act by one partner, or deceit practiced by him, within the scope of the general partnership authority, will make the other partners liable. Durant *v.* Rogers, 87 Ill. 508; Wolf *v.* Mills, 56 Ill. 360; Chester *v.* Dickerson, 54 N. Y. 1; Rogers *v.* Aydelotte, 1 Cincinnati, 81; Locke *v.* Stearns, 1 Met. 560; Manufacturers', etc., Bank *v.* Gore, 15 Mass. 75, 81; Boardman *v.* Gore, Id. 331; Hawkins *v.* Appleby, 2 Sandf. 421; Reynolds *v.* Waller, 1 Wash. 164; Doremus *v.* McCormick, 7 Gill, 49; Tenney *v.* Foote, 95 Ill. 101.

But the firm is not chargeable for the fraud of one partner committed outside the scope of the firm business. Pierce *v.* Jackson, 6 Mass. 242; Sherwood *v.* Marwick, 5 Me. 295.

Where A, on entering into partnership with B, purchases an interest in a stock of goods held by B, and the goods are afterwards seized on attachment as the property of a third person, and in an action by A and B against the attaching officer, it appears that the goods were sold to B by the attachment debtor, and that such sale was fraudulent and void as to the attaching creditor, A and B cannot recover any part of the goods, on the ground that A purchased his interest without knowledge of the fraud. Estabrook *v.* Messersmith, 18 Wis. 545.

A firm is bound by the frauds or illegal acts of a partner done in the course of the firm business. So, where a firm was formed by A and B for engaging in the commission business, A to furnish the capital, and B generally did all the trading of the firm, and B made a contract with another in the the course of the firm business, and in its name, for trading for a commission on the board of trade, which was illegal, as relating to option or gaming contracts, all the dealings predicated upon such contract will be under legal con-

On the other hand, the firm is not liable for the other frauds of its members, unless it has in fact sanctioned such frauds, or the transactions of which they form part. It will be convenient to examine this subject with reference to misapplications of money and false representations by partners, and then to consider the liability of companies for the frauds of their directors.

Liability of partnerships for misapplication of money by their members.

In order that a firm may be liable for the misapplication of money by one of its members, some obligation on the part of the firm to take care of the money must be shown. A receipt of the money by the firm *primâ facie* imposes this obligation; but where there is no receipt by the firm, there is *primâ facie* no obligation on its part with respect to the money in question. It becomes important, therefore, to determine accurately when money is to be considered as received by the firm. Upon this point the following observations suggest themselves.

1. The firm must be treated as receiving what any partner receives as its real or ostensible agent, *i. e.*, in the course of transacting the business of the firm.

2. In a case of this sort it is immaterial whether the other partners know anything about the money or not, for *ex hypothesi*, it is in the custody of one who must be regarded as their agent. (*n*)

3. The firm cannot be treated as receiving what one partner receives otherwise than as its real or ostensible agent, unless the money actually comes into the possession or under the control of the other partners. (*o*)

4. Agency being excluded in such a case as the last, the money cannot be considered as in the possession or under the control of the innocent partners, unless they know that it is so, or unless they are culpably ignorant of the fact. (*p*)

demnation, and a note given in consideration of a balance due under such contract to the firm, will be void as against the firm, or an assignee with notice, although A, the other partner, had no knowledge of the illegality of the contract. Tenney *v.* Foote, 95 Ill. 101.

(*n*) See *infra*, rules 1 and 2.

(*o*) See rules 3 and 4.

(*p*) Compare rule 2 with rules 3, 4 and 5; and as to culpable ignorance, compare Marsh *v.* Keating, 2 C. L. & Fin. 289; Sims *v.* Brutton, 5 Ex. 802; *Ex parte* Geaves, 8 DeG. M. & G. 291.

*These principles will be found to reconcile most, if not all, of the numerous decisions upon the important subject now under consideration, and to warrant the following rules deduced from them. *303

1. *Where one partner, acting within the scope of his authority, as evidenced by the business of the firm, obtains money and misapplies it, the firm is answerable for it.*[1] 1. Liability of firm for money received by one partner in the course of business.

In Willett *v.* Chambers (*q*) two persons carried on business as solicitors and conveyancers, in partnership. One of them received money from a client to invest on mortgage, and misapplied it. The other partner was held liable to repay it to the client. Lord Mansfield relied upon the fact that the bill for the fictitious mortgage was made out in the name of the firm, and was paid to the innocent partner. The transaction therefore was clearly a partnership transaction, and the defendant, although perfectly innocent of the fraud himself, was liable for the consequences. Willett *v.* Chambers.

In Brydges *v.* Branfill (*r*), one of several solicitors connived at a fraud committed by a client of the firm in obtaining money out of the court of chancery. The money was Brydges *v.* Branfill.

[1] See *ante*, 299, note.

Where a claim was placed in the hands of two attorneys who were partners in the practice of law, for collection, and judgment was obtained, land of the debtor sold under execution, and redemption from the sale made by paying the money to the sheriff, who paid it over to one of the attorneys, but prior to the redemption, the co-partnership between the attorneys was dissolved: *Held*, that both of the partners were liable to the client for the money thus received by one of them after the dissolution. Smyth *v.* Harvie, 31 Ill. 62; S. P. Poole *v.* Gist, 4 McCord, 259.

Where money was fraudulently obtained by a partner, in the name of the firm, and in business transactions such as the firm was engaged in: *Held*, that the firm might be liable therefor, although the transactions were unknown to the other partner; but that, if the person dealing with such partner, knew that the latter was acting in violation of his duty to the firm, the latter would not be liable. Alexander *v.* State, 56 Ga. 478.

(*q*) Cowp. 814. See, also, Atkinson *v.* Mackreth, 2 Eq. 570; St. Aubyn *v.* Smart, 5 Eq. 183, and 3 Ch. 646; Dundonald *v.* Masterman, 7 Eq. 515. Compare Viney *v.* Chaplin, 2 DeG. & J. 483, and Bourdillon *v.* Roche, 27 L. J. Ch. 681, and Harman *v.* Johnson, 2 E. & B. 61; Plumer *v.* Gregory, 18 Eq. 621; noticed *infra*. These cases show that whilst it is the ordinary business of a solicitor to receive money from a client for investment on a specific security, it is not part of his ordinary business to receive money for investment generally, nor to receive money for a client on the payment off of a mortgage, or on a sale.

(*r*) 12 Sim. 369. See, too, Todd *v.* Studholme, 3 K. & J. 324.

received by the one partner under a power of attorney, and was handed over to the client. The other partners were entirely innocent, and were, in fact, ignorant of the transaction. It was nevertheless held that they were jointly and severally liable to make good the money to those to whom it really belonged .(*s*)

*304 *In these cases the receipt of the money by one of the partners was the receipt by the firm; and the firm was liable, although in fact the other partners never received the money money or knew of its receipt (*t*).

2. *Where a firm in the course of its business* (*u*), *receives money belonging to other people, and one of the partners misapplies that money whilst it is in the custody of the firm, the firm must make it good.*[1]

2. Liability of firm for money in its custody in the course of business.

In Devaynes *v.* Noble, Clayton's case (*x*), some exchequer bills, deposited by their owner with a firm of bankers, were sold by one of the partners without the owner's knowledge; the money produced by the sale was applied by the firm to its own use; and it was held to be clear that the money having been received by the partnership, the amount became a partnership debt whether all the individual partners were or were not privy to the sale.

Clayton's case.

In Devaynes *v.* Noble, Baring's case (*y*), the firm was held liable for stock of its customers standing in the name of one of the partners of the firm, and wrongfully sold out by him. For the stock was standing in his name alone, in accordance with the ordinary practice of the firm; the produce of the sale of the

Baring's case.

(*s*) Although solicitors who are partners are responsible for the acts of each other, the court will not exercise its summary jurisdiction against a solicitor to whom personally no blame is attributable. See *Re* Lawrence, 2 S. M. & G. 367: *Ex parte* Gould, 2 Mon. & A. 48; Dixon *v.* Wilkinson, 4 Drew, 614, and 4 DeG. & J. 508; and *Re* Ford, 8 Dowl. 684. But where a firm of solicitors are the solicitors on the record, see Norton *v.* Cooper, 3 Sm. & G. 375.

(*t*) See St. Aubyn *v.* Smart, *ubi sup.*

(*u*) See *infra*, prop. 5 as to the importance of this qualification.

[1] The Boston fire-relief committee gave a firm a sum of money to be used "in re-establishing their business," taking a note therefor, which was not to be paid if the money should be devoted to such purpose. One member applied the money to pay a pre-existing debt of the firm to his father: *Held*, that a decree was properly granted that the money should be refunded to the remaining partner. Stanley *v.* Stark, 115 Mass. 259.

(*x*) 1 Mer. 575.

(*y*) 1 Mer. 611; see, too, Warde's case, ib. 624, and Vulliamy *v.* Noble, 3 Mer. 593.

stock had been received by the firm, and had thus become a partnership debt; and the firm, in the accounts rendered by it to its customer, had falsely represented the stock as still standing in the name of the partner who had sold it, and had given credit for the dividends as if the stock had still been there.

In *Ex parte* Biddulph (*z*), trust money in the hands of a firm of bankers, was drawn out and misapplied by one of the firm, and it was held that all the partners were liable to make it good. *Ex parte* Biddulph.

In Sadler *v.* Lee (*a*) the members of a banking firm were authorized jointly and severally to sell out stock standing in the name of a customer, and one of the partners exercised the *power and sold out the stock, and the firm was credited with the proceeds of the sale. These were afterwards misapplied by one of the partners, and it was held that the firm was answerable for the money. Sadler *v.* Lee. *305

Another well-known case illustrating the same principle is Blair v. Bromley (*b*). These two persons were in partnership as solisitors. A client entrusted one of them with money to invest on mortgage, and was told by him that it had been invested; whereas, in truth, the partner who had received the money had misapplied it. For many years the client was regularly paid interest by the solicitor who attended to the matter, and the fraud was not discovered until he became bankrupt. The other partner, who knew nothing whatever of the fraud, was nevertheless held liable to make good the money. It had been placed to the partnership account at the bankers' of the firm; the representation that it had been duly invested was within the scope of the duty of one partner with reference to the transaction in question; and it was held that the innocent partner could not divest himself of his liability by showing that he had no control over the account at the bankers', and did not in fact attend to the monetary transactions of the firm. Blair *v.* Bromley.

In De Ribeyre *v.* Barclay (*c*), the defendants were in partnership as stockbrokers, and were in the habit of receiving monies from the friends and connections of the firm, De Ribeyre *v.* Barclay.

(*z*) 3 DeG. & Sm. 587.

(*a*) 6 Beav. 324.

(*b*) 5 Ha. 542, and 2 Ph. 354. See, also, Eager *v.* Barnes, 31 Berv 579, a somewhat similar case.

(*c*) 23 Beav. 107; compare this case with *Ex parte* Eyre, 1 Ph. 227; Bishop *v.* The Countess of Jersey, 2 Drew. 143; Coomer *v.* Bromley, 5 DeG. & Sm. 532, noticed *infra*, p. 310.

and of the individual partners for the purposes of investment. They also seem to have been in the habit of keeping for their customers the securities on which the investments were made. The plaintiff had some Portuguese bonds held by one of the partners for the plaintiff as a customer of the firm. The plaintiff married, and these bonds were assigned to trustees of whom that partner was one. The bonds remained in his custody as before, and were in fact deposited (and, as it seemed, with other securities belonging *306 to other customers) with the bankers of *the firm. The bonds were afterwards converted by the same partner into other bonds, which were deposited as the first had been. He acted in this matter as a stockbroker, in conformity with the usual course of business of the firm, and advised the plaintiff from time to time in the name of the firm of what had been done. The bonds were afterwards misapplied by him. It was held that they were originally clearly in the custody of the firm, and not in the custody of one only of its members, simply as trustee. It was further held that the assignment of the bonds did not take them out of the custody of the firm, and that the firm was therefore liable for the loss consequent on their unauthorized removal.

In the same case the firm was held liable for the loss of other bonds and securities bought by them for the plaintiff, and left in their custody in the usual way, and for money borrowed in the name of the firm, but from which the firm derived no benefit; and the fact that the plaintiff dealt only with one partner was held immaterial, the business transacted being the ordinary and regular business of the firm, and appearing as such in its books and accounts.

Principle of foregoing cases.

The principle of these cases is that the firm has in the ordinary course of its business obtained possession of the property of other people, and has then parted with it without their authority. Under such circumstances the firm is responsible: and the fact that the property has been improperly procured and placed in the custody of the firm by one of the partners, does not lessen the liability of the firm; for whether the firm is or is not liable for the original fraud by which the property got into its hands, it is responsible for the subsequent misapplication thereof by one of its members.

This was decided in the cases arising out of the notorious Fauntleroy forgeries (*d*). Fauntleroy, who was a partner in the banking house of Marsh & Co., forged powers of attorney *for the sale of stock belonging to the customers of the bank. Marsh & Co. had an account with Martin Stone & Co., and the broker who sold out the stock under the forged powers of attorney remitted the proceeds of the sale to the credit of Marsh & Co. with Martin Stone & Co. Fauntleroy then drew out these monies by a cheque signed by him in the name of his firm, and applied them to his own use. The firm of Marsh & Co. was, however, held liable for them, although none of the partners except Fauntleroy had any hand in his forgeries or frauds, or in fact knew anything of what had taken place. The liability of the firm was based upon the ground that to sell stock for its customers and to receive the proceeds of the sale fell within the scope of its business; that the sale took place and the money was received in the usual way; that the fraud of Flauntleroy in the subsequent appropriation of the money afforded no defense after the money had once been in the custody of the firm: and that if the other partners knew nothing of the receipt of the money, they might have known it, and would have ascertained the source from which it had been derived, if they had used ordinary diligence, and had not placed such implicit confidence in their co-partner. (*e*)

Fauntleroy forgery cases.

*307

3. *If a partner in the course of some transaction unconnected with the business of the firm obtains money and then misapplies it, the firm is not thereby liable to make good the loss.*

3. Liability of firm for money received, but not in ordinary course of business.

In Harman *v.* Johnson (*f*), one of several solicitors was entrusted with money for the purpose of investing it on mortgage when a good opportunity offered. He misapplied

Harman v. Johnson.

(*d*) Stone *v.* Marsh, 6 B. & C. 551, and Ry. & Moo. 364; Keating *v.* Marsh, 1 M. & A. 582; Marsh *v.* Keating, 1 Bing. N. C. 198, and 2 Cl. & Fin. 250; *Ex parte* Bolland, Mont. & McAr. 315, and 1 M. & A. 570; Hume *v.* Bolland, Ry. & Moo. 371, and 1 Cr. & M. 130. This last case is hardly consistent with Stone *v.* Marsh, Marsh *v.* Keating, or *Ex parte* Bolland.

(*e*) In Stone *v.* Marsh and *Ex parte* Bolland, Fauntleroy's partners did know that the stock was sold by their broker, but did not know that the powers of attorney were forged. In Marsh *v.* Keating, they do not seem to have known anything either of the sale of the stock or of the receipt of the proceeds of the sale. Compare as to the receipt of the money by the firm the cases cited in the next four pages.

(*f*) 2 E. & B. 61.

it, and it was held that his co-partner was not liable, inasmuch as there was no evidence to show that it was part of the business either of the firm in question or of solicitors generally to act as scriveners, *i. e.*, as depositaries of money waiting for investment.

The Court intimated that if it had been shown that the *308 money was *given to the defaulting solicitor for the purpose of being invested on some specified mortgage, his co-partner would have been liable for its misapplication.

Plumer v. Gregory.

In Plumer *v.* Gregory (*g*), one of a firm of solicitors borrowed money without the knowledge of his co-partners from a client, saying that the firm wanted to lend it to another client on mortgage. The other partners were held not liable for this money, although two of them had borrowed money from the same client before.

Sims v. Brutton.

The case of Sims *v.* Brutton (*h*) must be referred to this head if its authority is to be upheld. There the defendants Brutton and Clipperton were in partnership as solicitors. Brutton received 500*l.* from a client to invest on a mortgage, and the money was duly invested. The mortgage deed remained with the defendants, and the money secured by it was ultimately repaid to Clipperton, who then gave up the deed to the mortgagor. Shortly after this Clipperton re-lent 300*l.*, a part of the 500*l.*, and again received back the mortgage deed as a security, and ultimately this 300*l.* was repaid to him and the mortgage deed was again delivered up to the mortgagor. Clipperton had no authority to receive payment of the 500*l.* from the mortgagor, nor to re-lend the 300*l.*, nor to receive repayment of it, and he acted throughout the whole of these transactions without the knowledge of his co-partner, or of the mortgagee, the client of the firm. The books of the firm, however, showed the receipt of the 500*l.* in the first instance; its loan and repayment; and also the loan and repayment of the 300*l.* The client was, moreover, credited from first to last with the receipt of interest on the whole 500*l.*, and was debited with the same interest, which was in fact regularly paid to his agent. Clipperton misapplied the whole 500*l.*, and the Court held that Brutton, his partner, was not liable to make it good. The defendants, it was

(*g*) Plumer *v.* Gregory, 18 Eq. 621, as to the 1700*l.* Compare this and the last case with Willett *v.* Chambers, and other cases cited *ante*, 303, note (*q*).

(*h*) 5 Ex. 802. See, also, Coomer *v.* Bromley, 5 DeG. & Sm. 532, noticed *infra*. v. 310.

said, discharged their duty by lying out the money as directed, and they had no authority to receive it back. Therefore the repayment to Clipperton, though treated *by him as a partnership transaction, was not so in point of law, and did not create any partnership responsibility. The entries in the books were only evidence of knowledge on the part of Brutton, and the case stated for the opinion of the Court expressly found that he had no knowledge of the facts. *309

Upon this case it is to be observed, that if, as appears to have been the case, the 500*l.* when paid off was placed to the credit of the firm with its bankers, the decision is difficult to reconcile with Stone *v.* Marsh and Marsh *v.* Keating. (*i*)

4. *A fraud committed by a partner whilst acting on his own separate account is not imputable to the firm, although had he not been connected with the firm he might not have been in a position to commit the fraud.* 4. Liability of firm for frauds of partner acting on his own account.

In *Ex parte* Eyre (*k*), the customer of a firm of bankers deposited with them a box containing securities belonging to himself, and he authorized one of the firm to take out some of the securities, replacing others, however, in their place. The partner so authorized, after obtaining the securities he was authorized to take and substituting others, clandestinely withdrew these last, and applied them to his own use. It was held that the firm was not liable for this act, and was not bound to make good the consequent loss; for it did not appear that the firm had any authority to open the box or to examine its contents, and the abstraction of the securities was a tortious act committed by one partner, who had been specially authorized to open the box, and who took out the securities, not for the partnership, nor for any partnership object, but in his separate character and for his own individual and separate purposes. Ex parte Eyre.

In Bishop *v.* The Countess of Jersey (*l*), one of a firm of bankers advised the plaintiff, a customer of the bank, to sell out some stock, telling her that there was an opportunity to place out 5000*l.* on a good security at 5*l.* per cent. to be given by his son. She accordingly authorized the sale, and the Bishop v. Jersey.

(*i*) The Statute of Limitations afforded a good defense to the action in Sims *v.* Brutton. The propriety of the decision in that respect is untouched by the observations in the text.

(*k*) 1 Ph. 227, affirming S. C. 2 M. D. & D. 66.

(*l*) 2 Drew, 143.

money produced was placed to her credit at the bank. She *310 *then drew a cheque for 5000*l.*, which she gave to the partner with whom she had been in communication. No security was ever given; the money was lost; the partner in question absconded. Interest, however, on the 5000*l.* was for some time placed to the credit of the plaintiff in her account with the bank, but by whom did not appear. The other partners knew nothing of what had taken place until after the fraud had been committed, and it was held that they were not answerable. The transactions had nothing to do with the business of the partnership, and if they had not taken place at the bank there would have been no pretense for saying that the one partner was acting otherwise than in a separate affair of his own.

A more difficult case, but one turning mainly on the same principle, is to be met with in Coomer *v.* Bromley. (*m*) There the defendants, William and Joseph Bromley, were solicitors. The plaintiffs were their clients, and were trustees of some Navy 5*l.* per cent. annuities, in which they were themselves beneficially interested for their lives. William Bromley was associated by the plaintiffs with them as trustee of these annuities. Upon their reduction from 5*l.* to 4*l.* per cent., the annuities were sold at the request of the plaintiffs, and it was arranged that the money arising from the sale should be invested on mortgage to be taken with the plaintiffs' consent in William Bromley's name alone. The annuities were sold; the money arising from the sale found its way to the credit of the firm at its bankers, but was not invested on mortgage as intended, and was apparently used as partnership money. William Bromley pretended that he had invested the money, and he paid interest accordingly. Ultimately, and with the plaintiffs' knowledge, a mortgage, of which William Bromley was sole mortgagee, was appropriated as a security for the money in question. This mortgage was sufficient in point of value to cover the amount realized by the sale, and was for that amount less a few pounds, which the plaintiffs divided between them. The security thus appropriated was afterwards realized by Wil- *311 liam Bromley, and *he misapplied the money, but it was not placed to the credit of the firm, nor did Joseph Bromley know anything of its receipt or application. Under these circumstances it

Coomer v. Bromley.

(*m*) 5 DeG. & Sm. 532. See, too, • p. 308. Compare St. Aubyn *v.* Smart, Sims *v.* Brutton, 5 Ex. 802, noticed *ante*, 5 Eq. 183, and 3 Ch. 646.

was held that Joseph was not liable to the plaintiffs for the loss; for the plaintiffs dealt with William Bromley as a trustee and not as a partner; they authorized him to take a mortgage in his own name alone; they acquiesced in the appropriation to their money of a security which was of sufficient value; and Joseph's duty was then at an end. The plaintiffs could not hold him liable for the loss of the mortgage money arising subsequently from the fraud of the mortgagee.

In these cases it will be observed that although the money in question had at one time been in the custody of the firm, such was not the case when the money was misapplied. This circumstance distinguishes the cases last referred to from De Ribeyre *v.* Barclay (*n*) and other cases of that class, the leading facts in which have been already stated. (*o*)

Distinction between these cases and those noticed on pp. 304-307.

5. *If a partner, being a trustee, improperly employs the money of his* cestui que trust *in the partnership business, or in payment of the partnership debts, this alone is not sufficient to entitle the* cestui que trust *to obtain repayment of his money from the firm.*[1]

5. Liability of firm for trust monies.

(*n*) 23 Beav. 107.

(*o*) *Ante*, p. 305.

[1] Where one partner holds money in trust for another, or borrows money on his individual credit, and applies it to the use of the firm, this does not make the original creditor a creditor of the firm, unless it is applied with the knowledge and privity of his co-partners. Jaques *v.* Marquand, 6 Cow. 497; Logan *v.* Bond, 13 Ga. 192; Tallmadge *v.* Penoyer, 35 Barb. 120; Willett *v.* Stringer, 17 Abb. Pr. 153; Guillon *v.* Peterson, 7 Weekly Notes of Cases, 268. See, *ante*, 299, note.

In Welker *v.* Wallace, 31 Ga. 362, however, where a member of a firm applied to its business money which he held as agent of a third party, it was *held*, that the firm was liable, whether the other partners knew at the time that the money belonged to such party or not.

Where one partner, to whom a third person has intrusted money, applies the money to the purposes of the firm, with the consent of all the partners, but without the consent of the owner of the money, such owner may elect to consider the firm his debtor, instead of the separate partner. Hutchnison *v.* Smith, 7 Paige, 26.

Where an administrator, a member of the partnership, used the funds of the estate in the firm business, and the other members had notice thereof: *Held*, that the firm and its members became jointly and severally liable for such funds. *In re* Jordan, 2 Fed. Rep. 319.

Where in such a case the administrator died, and an administratrix *de bonis* was appointed in his place, and the firm of which the former was a member became bankrupt: *Held*, that she might prove the claim for such fund against both estates. *In re* Jordan, 2 Fed. Rep. 319.

Where G. and S. and W., the three New York members of a firm, contrary

Ex parte Apsey.

In *Ex parte* Apsey (*p*), one of two assignees in bankruptcy was in partnership, and he applied part of the assets of the bankrupt in paying partnership debts. On the subsequent bankruptcy of the partnership it was held that the amount so applied was not provable against the joint estate.

Ex parte Heaton.

In *Ex parte* Heaton (*q*), a father and his sons were partners; the sons were trustees of a will, and instead of applying the trust monies according to the trust, they appropriated them to partnership purposes; but on the bankruptcy of the partnership it was held that the amount of the monies so appropriated was not provable against the joint estate, unless it could be shown that they were employed for the use of the partnership trade with the knowledge of the father, that they were trust funds; and an inquiry as to that was directed. (*r*)

*312 *It may at first sight be thought that these cases are opposed to Marsh *v.* Keating, and the other authorities before referred to (*s*), in which the firm was held liable for money which came to its hands. But in those cases the money came to the hands of the firm in the ordinary course of its business (*t*); whilst in the cases now under considera-

Distinction between these cases and Marsh *v.* Keating.

to the articles of a co-partnership, and without the knowledge of P., the Philadelphia member, went into stock speculations with the trust funds of an estate of which S. was an executor, and involved the estate in a large loss: *Held*, that a legatee thereof could not recover against P. for the loss. Guillon *v.* Peterson, 9 Phil. 225.

After a dividend is declared by a partnership, and the partner holding the share of an absent member, under a resolution of the company, pays it over in extinguishment of a debt due the company by another partner who promised to settle with the absent partner; all the members present, not dissenting from the resolution, are jointly liable for the amount of the dividend. Peters *v.* Horbach, 4 Pa. St. 134.

Where one member of a firm of real estate brokers receives money with which to purchase land for the person advancing the same, and passes it over to his partner, who deposits it to the credit of the firm, and the proof fails to show that it was invested as agreed, the firm will be liable. Kerr *v.* Sharp, 83 Ill. 199.

Where assets of a firm of A, B and C are applied to pay the debts of a former firm of A and B without C's consent, A and B are in equity liable to C therefor, jointly and severally. Wentworth *v.* Raiguel, 9 Phil. 275.

(*p*) 3 Bro. C. C. 265. See, also, *Ex parte* White, 6 Ch. 397.

(*q*) Buck. 386.

(*r*) *Ex parte* Clowes, 2 Bro. C. C. 595, is not opposed to the cases in the text, for there the joint and separate estates were consolidated.

(*s*) *Ante*, pp. 304–307.

(*t*) This may be thought incorrect with respect to Marsh *v.* Keating; but it was the business of the firm there to sell, through their broker, stock belonging to their customers, and to receive and

tion it is supposed to come otherwise. Liability must therefore attach to the firm, if at all, on wholly different principles, and the fact that the firm has had the benefit of the trust monies, is not sufficient to render it responsible for them. To be liable, the firm must be implicated in the breach of trust, and this it cannot be unless all the partners either knew whence the money came, or knew that it did not belong to the partner making use of it. Knowledge on the part of one partner will not affect the others, for the fact to be known has nothing to do with the business of the firm; and the case of *Ex parte* Heaton, already referred to, shows that in cases of this kind the liability as for a breach of trust does not extend to those who are ignorant of the matters before mentioned. But if knowledge of these matters can be imputed to the other partners, if they know, or ought to know, that trust monies are being employed in the partnership business, they will be held bound to see that the trust to which the money is subject authorizes the use made of it, and will be answerable for a breach of trust in case of its misapplication or loss. (*u*) It is important to bear this in mind when one partner has died; for if the surviving partners deal with his property, knowing that it belongs to his estate, knowledge *of the trust on *313 which the property is held will be imputed to them, and they may be thus involved in all the consequences of a breach of trust. (*x*) But this doctrine can hardly extend to the case of incoming partners, who do nothing except leave matters as they find them when they enter the firm. (*y*)

Where firm knows of the breach of trust.

If partners are implicated in a breach of trust, their liability is joint and several (*z*); and a decree for costs will be made against

remit the proceeds; and the money for which the firm was held answerable did arise from the sale of the stock of a customer, though it was sold under a forged power of attorney; and although Fonteleroy's partners knew nothing of the receipt of the money, their ignorance was considered culpable and of no avail.

(*u*) See *Ex parte* Woodin, 3 M. D. & D. 399; *Ex parte*, Poulson, De Gex, 79; *Ex parte* Watson, 2 V. & B. 414; Smith *v.* Jameson, 5 T. R. 601; Keble *v.* Thompson, 3 Bro. C. C. 112, and compare *Ex parte* Geaves, 8 DeG. M. & G. 291; *Ex parte* Barnewall, 6 DeG. M. & G. 801; *Ex parte* Burton, 3 M. D. & D. 364.

(*x*) See *infra*, book iv. c. 1, § 3.

(*y*) See Twyford *v.* Trail, 7 Sim. 92.

(*z*) Imperial Mercantile Credit Assoc. *v.* Coleman, L. R. 6 H. L. 189; Devaynes *v.* Noble, Sleech's case, 1 Mer. 563; Baring's case, ib. 614; Sadler *v.* Lee, 6 Beav. 324; Brydges *v.* Branfill, 12 Sim. 369; Blair *v.* Bromley, 2 Ph. 359; Wilson *v.* Moore, 1 M. & K. 127 and 337; *Ex parte* Poulson, De Gex, 79. Compare *Ex parte* Burton, 3 M. D. & D.

them all, although they may not be all equally to blame. (*a*)

Liability for breach of trust, joint and several.

But persons who borrow trust money from executors or trustees are only liable to repay it with interest; and although the lenders may have no authority to lend the money, the borrowers are not liable to account for the profits which they may have realized by its employment. (*b*)

Borrowing trust money.

Following trust money.

Although a firm is not liable to make good trust money applied to its use by one of its members in breach of the trust reposed in him, unless the firm can be implicated in the breach of trust, this doctrine will not preclude a *cestui que trust* from following his own money into the hands of the firm, and demanding it back, if he can show that the firm still has it, and the firm did not come by it by purchase for value without notice. The true owner of money traced to the possession of another has a right to have it restored, not because it is a debt, but because it is his money. His right is incidental to his ownership; and whether the money is traced to the hands of a single individual, or to the hands of a firm, is wholly immaterial. (*c*)[1]

364. It, however, by no means follows, that on the bankruptcy of the firm, there can be a proof against the joint as well as against the separate estate. See *Ex parte* Barnewall, 6 DeG. M. & G. 801. This will be discussed in the chapter on Bankruptcy.

(*a*) Lawrence *v.* Bowle, 2 Ph. 140.

(*b*) Stroud *v.* Gwyer, 28 Beav. 130.

(*c*) See as to tracing money, Lewin on Trusts, ch. xxix. § 2; Scott *v.* Surman, Willes, 400; Taylor *v.* Plumer, 3 M. & S. 562; Small *v.* Attwood, Young, 507; Pannell *v.* Hurley, 2 Coll. 241; Pennell *v.* Deffell, 4 De G. M. & G. 372; Frith *v.* Cartland, 2 Hem. & M. 417; Brown *v.* Adams, 4 Ch. 764.

[1] A and B were jointly interested in a claim which was ultimately decided in their favor. Before the decision was made, A formed a partnership with C, and the money was remitted to the firm of A and C, and placed to A's credit on the books of the firm. A died insolvent, largely indebted to C. It appeared that C, previously to forming the partnership with A, had full knowledge of the interest of B in the claim: *Held*, that C could not apply the money to the satisfaction of his debt against A; and that B was entitled to recover his proportion of all the money received on account of the claim. Vanderwick *v.* Summerl, 2 Wash. 41.

The rule that trust property may be followed into whatsoever hands it goes, with notice of the trust, does not apply in cases where an officer of a bank, being a member of a partnership, without due security, lends to his firm funds of the bank, which become mingled with the other partnership property. Case *v.* Beauregard, 1 Woods, 125.

If funds of a married woman, held in trust under the Code by her husband, are mingled by him with the funds of a partnership of which he is a member, the partnership funds are not charged with the part, either during the life of

*Liability of partnerships for the false representations of their members. *314

1. As a general rule, and subject to certain statutory exceptions, a firm is liable for the false and fraudulent representations of any of its members relative to matters falling within the scope of the partnership business.[1] This cannot be better illustrated than by the case of Rapp *v.*

1. Liability of firm for false statements of one partner. Rapp v. Lathan.

the husband or after his death. Dent *v.* Slough, 40 Ala. 518.

The contribution of trust property to the capital stock of a co-partnership at the time of its formation, by a trustee, as his own property, and so contributed without notice or knowledge to the other co-partners of the fact of its being trust property, is closely analogous to its sale and purchase. There is but little, if any, difference in principle. In such case, the *cestui que trust* seeking his property (thus converted) from partnership assets, can only claim and take therefrom what his trustee would be entitled to take, had he been vested with absolute ownership of the funds invested by him in the co-partnership, instead of holding the same as he did, merely in trust. The equities of the co-partners of a trustee dealing with him as the absolute owner of the property contributed by him to the co-partnership, and without notice or knowledge of any trust relations in regard to the same, are paramount to those of the *cestui que trust* in regard to such property. Hollemback *v.* More, 44 N. Y. Supr. Ct. 107.

A partner who fraudulently appropriates money of the partnership to the purchase of real estate, taking the conveyance in his own name, and of policies of life insurance, payable to his wife, may be charged, in equity, as trustee for the partnership. And as to the policies made payable to his wife, she, also, may be charged as trustee. Shaler *v.* Trowbridge, 28 N. J. Eq. 595. See, also, Renfrow *v.* Pearce, 68 Ill. 125.

One partner took money from the partnership funds, which he put into a new partnership: *Held*, that upon the insolvency of the new partnership, the former partnership could not follow the funds so taken, so as to give it a priority over other creditors. Ramsay *v.* Deas, 2 Dessau. 239.

[1] If one partner, in the name of his firm, makes a false representation as to a fact, under circumstances precluding him from disputing it, the firm and its members will be equally precluded, if the fact is such a one that the representation would be binding on the firm if true, and is also one concerning the truth of which the firm and its members possess peculiar means of knowledge, not enjoyed by the party to whom the representation is made. Coleman *v.* O'Neil, 1 N. W. Rep. 846.

One partner is liable for the acts of another partner, whereby deceptive appearances are created in land which is the subject of the partnership, and whereby the partnership realizes the proceeds of the fraud. Chester *v.* Dickerson, 52 Barb. 349.

A representation made by one member of a firm to a person who subsequently purchases commercial paper of the firm from a third party, without any intimation that the latter intends to make such purchase, does not render the

Latham. (*d*) There the defendants (Parry and Latham) were in partnership as wine and spirit merchants, and the plaintiff employed them to purchase wine for him on commission, and to sell the same as opportunity might offer. Parry was the active partner, and he alone attended to the business of the firm. He from time to time represented that he had effected purchases and sales on the plaintiff's account, and he remitted to the plaintiff, balances alleged to be due to him on the pretended sales. The plaintiff had advanced 126,000*l.* to be laid out in the purchase of wines, and he had received, on account of pretended re-sales and profits arising therefrom, 130,000*l.* There was, however, a considerable sum advanced by the plaintiff still unaccounted for, but which the defendant Parry alleged had been invested in the purchase of wine at so much a pipe; and to recover this sum the action was brought against Parry and his co-partner. No purchase or sale had ever been made by Parry, and the whole of his representations to the plaintiff were false and fraudulent. It was contended by Latham that he was not

partners liable individually, although it is false. *In re* Schuehardt, 15 Bankr. Reg. 161.

A silent partner, who did not know, nor assume to know, as to the truth of a statement of the condition of the firm made by one of his co-partners, to a person who purchased an interest in the firm on the faith of such statement, is not liable for damages to such person arising from fraud in the statement. Chamberlin *v.* Prior, 1 Abb. App. Dec. 338.

Partners selling their interest in the concern are not liable to the purchaser for fraudulent representations in relation thereto, made by one partner without their instigation or approval. Such purchaser, executing a note in the name of the new firm for an amount greater than the invoice price, and afterwards, by reason of the insolvency of his partner, compelled to pay the whole note, can only recover, in an action against the deceiving party for such fraud, his proportion of the excess of the note over the value of the property actually purchased. Schwabacker *v.* Riddle, 84 Ill. 517.

In an action against a partnership for fraudulent representations made by one of its members, a declaration alleging that he, acting in behalf of the firm procured a writ of replevin to be brought in the name of a third person and signed his own name to the replevin bond as surety; and that he declared to the plaintiff, who was a deputy sheriff, that the firm was responsible, and that his signature to the bond bound the firm, and that he was authorized by the firm to bind it by his signature alone, and thus induced plaintiff to accept the bond and serve the writ, whereby the firm obtained and disposed of the goods replevied for its own benefit, and that judgment was rendered for the defendant in replevin, and the goods were not returned, and the firm was not bound by the signature to the bond, and the plaintiff has been held liable for taking an insufficient bond; does not set forth facts sufficient to charge the other partner for the fraud. Gray *v.* Cropper, 1 Allen, 337.

(*d*) 2 B. & A. 795.

affected by the fraud of his co-partner, inasmuch as the fictitious purchases and sales were not in the ordinary course of trade, and were not, therefore, partnership transactions. But it was held that he was bound by the acts and representations of his partner Parry, and could not be allowed to say that those transactions were fictitious which Parry had represented to be real. The plaintiff was adjudged entitled to retain the 130,000*l.* remitted to him, and to recover back the advances for the supposed purchases in respect of which there had been no remittance.

Again, where one of several partners in a patent induced *the plaintiff, by false and fraud- *315 Lovell v. Hicks.
ulent representations, to pay 3000*l.* for part of the profits to be otained by its working, all the partners were held liable to repay the money, although there was no evidence of fraud on the part of more than one. (*e*)

The case of Blair *v.* Bromley (*f*) already alluded to, is another instance in point, and was in fact decided by the Lord Chancellor expressly upon the ground that persons who, having a duty to perform, represent to those who are interested in the performance of it that it has been performed, make themselves responsible for all the consequences of non-performance; and as one partner may bind another as to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is on equitable principles considered as having all the consequences of one. Blair v. Bromley.

Whether accounts, rendered by one partner in the name of the firm and showing that money is in the hands of the firm when in truth he has misapplied it, are to be treated as representations by the firm, is a question which has given rise to much discussion and upon which the cases are not uniform. But upon the whole it is conceived that if the accounts relate to matters within the scope of the partnership business the firm is bound by them. (*g*) False accounts rendered by one partner.

(*e*) Lovell *v.* Hicks, 2 Y. & C. Ex. 46 and 481.

(*f*) 5 Ha. 542, and 2 Ph. 354, *ante*, p. 305.

(*g*) See the two last cases, and Marsh *v.* Keating, 2 Cl. & Fin. 250; Devaynes *v.* Noble, Baring's case, 1 Mer. 611; De Rybeyre *v.* Barclay, 23 Beav. 107; See, on the other hand, Hume *v.* Bolland, 1 Cr. & M. 130; Sims *v.* Brutton, 5 Ex. 802.

Statutory exceptions.

By 9 Geo. IV. c. 14, § 6, a firm is not liable for a false and fraudulent representation as to the character or solvency of any person unless such representation is in writing signed by all the partners. The signature of one partner in the name of the firm will not bind any one but himself. (*h*)

2. Liability of firm for untrue statement as to authority.

2. If a partner, acting apparently beyond the limits of his authority, untruly represents that he is acting with his *co-partners' consent, they are not bound by this representation, nor are they liable for what may be done on the faith of it.[1] *316

Ex parte Agace.

Therefore in *Ex parte* Agace (*i*), where one partner gave partnership bills in payment of his own separate debt, and on being asked whether his co-partnerwas acquainted with the transaction, untruly replied that he was, and that he consented to it; it was held that the bills were not provable against the joint estate of the firm, they not being in the hands of a *bona fide* holder for value, without notice of the circumstances under which they had been given. In this case, the partner who gave the bills did that which was clearly not within the scope of his authority, and the person who took them knew it. The latter was, it is true, misled by the false answer to his question, but that answer was not referable to a matter within the scope of the partnership business; and the other partner did nothing to lead to the supposition either that he was a consenting party, or that he had authorized his co-partner to say that he was. (*k*)

Untrue statement as to nature of business.

A question of more difficulty arises when a partner alleges that the business of the firm is more extensive than it really is, or that it is different from what it is. But even in this case the firm would probably be held not liable for such a misrepresentation. *Ex hypothesi* the representation is not referable to anything falling within the scope of the partnership business; and it would probably be contended in vain that each partner was impliedly authorized by his co-partners to answer questions as to what business they really carried on in partnership.

(*h*) See Swift *v.* Jewsbury, L. R. 9 Q. B. 301, reversing Swift *v.* Winterbotham, L. R. 8 Q. B. 244. In this case the letter was signed by A. B., manager, but the words of the statute as construed by the Court of Appeal, warrant the statement in the text.

(1) See *ante*, 264, note.

i 2 Cox, 312.

k See, also, Kendal *v.* Wood, L. R. 6 Ex. 243, & per Kelly, C. B., in Mahoney *v.* East Holyford Mining Co., L. R. 7 H. L. 879 and 880.

If the person seeking to make the firm liable knew anything of the firm and of its business as ordinarily carried on, then *Ex parte* Agace is an authority to show that he could not succeed. If he knew nothing of the firm, he would be in the position of a person dealing with an agent whose authority is wholly unknown. Now an agent whose authority is wholly unknown cannot bind his principal by misrepresenting the authority conferred (*l*)*; and it is difficult, therefore, to see upon what *principle a partner could *317 in the case now supposed, bind the firm by misrepresenting his authority, or by misrepresenting the nature of the business of the firm which, as to strangers, determines that authority A member of a banking firm could hardly bind it by underwriting a policy in the name of the firm, and by untruly representing that he and his partners were insurers as well as bankers.

It is not necessary, in order to carry on the business of a firm in the ordinary way, that any of its partners should have power to induce other persons to join the firm. Hence if one partner induces a person by fraud, to join the firm, such fraud cannot be imputed to the firm, unless the partner in question had express authority to seek for a new partner, or unless the other members of the firm ratify the fraud when made aware of it. If, however, the incoming partner has brought in money to the firm, a retention of the money by the firm, with knowledge of the fraud, would amount to a ratification thereof, and would be equivalent to a fraud by all the partners in the first instance. Hence they cannot retain the money, as has been already seen. (*m*)

Fraud inducing a person to join the firm.

Liability of companies for the frauds of their directors.

Frauds of directors.

It is now proposed to examine the general question—Under what circumstances is a fraud perpetrated by the directors of a company imputable to the company?

Directors of a company have no implied authority from the company to make false representations on its behalf; and, generally speaking, frauds committed by directors are quite as much frauds on the companies they represent as on other persons; but consist-

(*l*) See Story on Agency, § 134, &c. The case supposes that *all* that is known about the agent's authority is what he himself says.

* See the authorities collected in Ewell's Evans on Agency, *16 note.

(*m*) See Lovell *v.* Hicks, 2 Y. & C. Ex. 46 and 431, noticed, *ante*, p. 314.

ently with the established principles of agency, it does not follow that, as between an innocent company on the one hand, dan an innocent individual defrauded by its directors on the other, the company is not responsible for the fraud committed by the directors. It has been held that the general interests of society demand that the representations by the directors of a company shall bind
*318 the company, although *the shareholders may be ignorant of the representations and of their falsehood. (*n*)

National Exchange Company of Glasgow v. Drew.

In The National Exchange Company of Glasgow *v.* Drew (*o*), the defendants had been induced, by the false statements contained in the reports of the directors to the shareholders of a company, and by the false representations of its manager, to borrow money of the company, and to buy shares in it with the money so borrowed, in order to keep the price of shares up in the market. The company sued for a return of the money lent, and the defendants relied upon fraud as an answer to the suit. The fraud was clearly proved, and it was held imputable to the company, and a sufficient ground of defense. The following passage from the judgment of the Lord Chancellor shows how the argument, that the fraud committed was not the fraud of the company, was met:

Judgment of Lord Cranworth.

"The company, as an abstract thing, can represent or do nothing. It can only act by its managers. When, therefore, the directors, in the discharge of their duty, fraudulently (for I assume this to be so), for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that which they know it to be, and the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company. Otherwise companies of this sort would be in this extraordinary predicament—that they might employ, nay, must employ, agents to carry on their concerns, and that those agents might make representations, be they ever so false and ever so fraudulent, and yet that the company might and must benefit by those misrepresentations, without being at all liable to be told, that is your fraud. It was plausibly argued that these reports were not made *by* the company but *to* the company. In form that is so. No doubt they are

(*n*) Western Bank of Scotland *v.* Addie, L. R. 1 H. L. Sc. App. 145; The National Exchange Co. of Glasgow *v.* Drew, 2 McQueen, 103; Mackay *v.* Commercial Bank of New Brunswick, L. R. 5 P. C. 394. See, too, Ranger *v.* The Great Western Rail. Co. 5 H. L. C. 72.

(*o*) 2 McQueen, 103. The judgments in this case were reviewed by Lord Chelmsford in Nicol's case, 3 De G. & J. 387, and were not altogether approved by him. See, however, the judgment of Lord Justice Turner in the same case.

reports made to the company. But I assume, for the present, that they were made to the company under such circumstances that what they so report is known and intended to be known, not only to the shareholders, but to all persons who may be minded to become shareholders, just the same as if they were published to the world. I repeat that I think the exigencies of society demand *that the *319 reports so made and so circulated should be deemed to be the reports of the company." Lord St. Leonards expressed a similar view upon this question. He said, "If representations are made by a company fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, those representations so made by them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company; it is their own representation. What is the first act which takes place at any such meeting as that at which the report was read? The first act which takes place at every such meeting in Scotland and England is, that if there is not a rejection, there is an adoption of the report; then I say the report is the act of the company, and not simply of the directors. It does not stand as the simple statement of the directors. It becomes the act of the company by the adoption of the report, and sending it forth to the world as a true representation of their affairs, and if that representation is made use of in dealing with third persons for the benefit of the company, it subjects them to the loss which may accrue to the party who deals, trusting to those misrepresentations."

Judgment of Lord St. Leonards.

Again in New Brunswick Co. *v.* Conybeare (*p*), the facts of which will be referred to hereafter in considering the subject of the rescission of contracts for fraud, Lord Westbury said:

New Brunswick Co. *v.* Conybeare.

"I certainly am not at all disposed to advise your lordships to throw any doubt upon this doctrine, that if reports are made to the shareholders of a company by the directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and those reports are afterwards industriously circulated (*q*), undoubtedly representations contained in those reports must be taken, after their adoption, to be representations and statements made with the authority of the company, and therefore binding the company. Neither do I think it would be at all expedient to question this conclusion—that if those reports, having been industriously circulated, shall be clearly shown to have been the proximate and immediate cause of shares having been bought from the company by any individuals, or subscribed for by any individuals, undoubtedly it will be impossible, consistently with the principles of equity, to permit the company to retain the benefit of that contract, and to keep the purchase money that has been so paid. There may be a very different consideration applied to the same transaction in a court of law and in a court of equity; because when an attempt is made in a court of law to render a party liable in damages for certain consequences of a mis-

Judgment of Lord Westbury.

Difference between law and equity.

(*p*) 9 H. L. C. 711.

(*q*) A report by the directors to the shareholders is not industriously circulated by being sent to absent shareholders. Barrett's case, 2 Dr. & Sm. 415.

representation, it is necessary to prove that the individual was aware, at
*320 the time, of the falsehood of the representation, *or ought to have been so aware; but with regard to a claim for the restitution of property acquired through false representations made by an individual acting in the capacity of agent, although the company were no parties to those representations, and did not distinctly authorize them, it would still appear to be inconsistent with natural justice to permit property acquired by the company through the medium of those representations to be retained by them. So far, therefore, as these reports are concerned, they must be taken, I think, to be representations made by the company." (*r*)

Judgment of Lord Cranworth.

Lord Cranworth expressed it as his opinion, "That if an incorporated company, acting by an agent, induces a person to enter into a contract for the benefit of the company, that company can no more repudiate the fraudulent agent than an individual could repudiate him, and that consequently the company are bound by the misrepresentations of their agent:" and after alluding to the opinion he had expressed in the National Exchange Company *v.* Drew, and which is given above, his lordship added:

"To that opinion I entirely adhere; and I think it would have been applicable in this case if it had been proved that there had been a fraudulent representation or concealment by the directors, in order to induce Mr. Conybeare to purchase, not shares in the market (that is a very different thing), but shares belonging to the company; namely, forfeited shares. If the directors, or the secretary acting for them, had fraudulently represented something to him which was untrue, I then adhere to the opinion which I expressed in the former cases, that the company would have been bound by that fraud. But the principle cannot be carried to the wild length that I have heard suggested, namely, that you can bring an action against the company upon the ground of deceit, because the directors have done an act which might render them liable to such an action. That I take not to be the law of the land, nor do I believe that it would be the law of the land if the directors were the agents of some person not a company. The fraud must be a fraud that is either personal on the part of the individual making it, or some fraud which another person has impliedly authorized him to be guilty of."

Principles applicable to these cases.

The principles above laid down have indeed been questioned (*s*); but so long as it is law that a principal *may* be bound by the unauthorized act of his agent (*t*), so long it will be impossible to deny that companies *may* be affected by the false and fraudulent representations of their directors, although they have no authority to promulgate falsehoods. The falsehood may be an
*321 excess of authority, but it does not therefore *follow that it is

(*r*) See, in illustration of this doctrine, Lovell *v.* Hicks, *ante*, p. 314; Slim *v.* Croucher, 1 De G. F. & J. 518; Smith *v.* Reese River Co. 2 Eq. 264; and L. R. 4 H. L. 64.

(*s*) See Nicol's case, 3 DeG. & J. 387; Mixer's case, 4 ib. 575; Barrett's case, 2 Dr. & Sm. 415.

(*t*) As to which, see *ante*, p. 297; and Foster *v.* Green, 7 H. & N. 881.

imputable only to those who utter it (*u*): and it is now settled that a false and fraudulent statement made by an agent of a company is, in point of law, the statement of the company, if the statement relates to a matter as to which he is its agent, and if it is made in the course and as part of the business which he is appointed to transact for the company. (*u*)[1] Moreover there is no difference in principle between a fraudulent misstatement and a fraudulent concealment of a material fact. (*v*)

Distinction between reports of directors and reports of shareholders.

A distinction is sometimes drawn between false reports made by directors to the shareholders, and adopted by them and then laid before the public, and false statements made by the directors alone to persons making inquiries of them with reference to the affairs of the company. But if such statements as the last cannot bind the company, it is difficult to see on what principle untrue reports adopted by shareholders can be regarded as emanating from those shareholders who do not expressly adopt them. If the directors are not the agents of the body of shareholders, for the purpose of stating what is false, surely some of the shareholders are not the agents of the rest for the same purpose. To say that a falsehood emanating from the directors is not imputable to the company, but that a falsehood emanating from a meeting of the shareholders is imputable to the company, cannot be right. The same principles ought to be applied to both cases; and the distinction between representations made by shareholders and similar representations made by directors is only sound when the representations relate to matters which the shareholders are competent to deal with, but the directors are not.

Reports and circulars when not imputable to company.

It must not be concluded from the foregoing observations that circulars and reports issued by a company are to be regarded as representations by the company to any one who *sees them and is induced, even by *322

(*u*) Barwick *v.* English Jt. Stock Bank, L. R. 2 Ex. 259, approved and followed in Swire *v.* Francis, 3 App. Ca. 106; Oakes *v.* Turquand, L. R. 2 H. L. 325; Venezuela Rail. Co. *v.* Kisch, L. R. 2 H. L. 99; Reese River Co. *v.* Smith, L. R. 4 H. L. 64; Western Bank of Scotland *v.* Addie, L. R. 1 H. L. Sc. 145; Mackay *v.* Commercial Bank of New Brunswick, L. R. 5 P. C. 394. Compare Swift *v.* Jewsbury, L. R. 9 Q. B. 301. See the Scotch cases collected in 1 Clark, Partn. 256.

[1] See the cases collected in Cooley on Torts, 494, 495; Ewell's Evans on Agency, *471, note.

(*v*) See Peek *v.* Gurney, 13 Eq. 79, and 6 H. L. 377; Barwick *v.* English Jt. Stock Bank, L. R. 2 Ex. 259.

an officer of the company, to act upon them. They will not amount to representations by the company unless they were issued for the purpose for which they are afterwards used; nor unless used by some person whose business it is to carry out that purpose; nor unless used by him when acting on behalf of the company. This is well illustrated by Burnes *v.* Pennell (*x*), which is sometimes, but erroneously, supposed to have decided that false reports made by the directors to their shareholders, and afterwards laid before the public, are not to be regarded as representations by the company. In this case a company was paying dividends when it was not warranted in doing so; its directors had issued and published false reports as to the flourishing state of its affairs; some time after these reports had been published, and when in fact they were old, they were shown by the law agent of the company to a person who was desirous of taking shares in it, and who ultimately did take shares in it on the faith of the representations made to him by the law agent, backed by the reports in question. It was held that these circumstances afforded no answer to an action for calls. It was no part of the business of the law agent to induce people to take shares in the company; no part of his business to make any representations as to the affairs of the company. The case is an authority for the proposition that representations made by an unauthorized person, although an officer of the company, do not bind the company, and that reports of the company used by him to substantiate his statements are not to be regarded as representations made by the company to the person to whom he shows them. But the case is no authority for the proposition that reports of directors are not reports of the company upon whose affairs it is part of their business to report. Whether any person who sees them is entitled to make use of them against the company is quite a different matter. He is only entitled to do so in one of two cases, viz., 1, if the reports are published for the purpose of being acted upon by the public, and he as one of the public deals with the company upon the faith of them; or, 2, if, being used for the purposes for which they were published, they are so used by the agents of the company when acting within the limits of their real or apparent authority and on behalf of the company.

Burnes v. Pennell.

*323

(*x*) 2 H. L. C. 497. See, too, Nicol's case, 3 DeG. & J. 387; Bigge's case, 5 Jur. N. S. 7; Worth's case, 4 Drew, 529.

In Barry *v.* Croskey (*y*), it was attempted to make a company liable for alleged frauds on the part of the directors in getting up the company and issuing its shares, and in procuring the recognition of the company by the Stock Exchange Committee, and the appointment of a settling day for its shares. The bill charged that the company had adopted and ratified the acts of the directors, and that by the frauds in question the shares of the company had commanded in the market prices considerably higher than would otherwise have been possible. The bill then stated various dealings and transactions in shares of the company between the plaintiff and the broker of one of the directors, and that by these dealings and transactions, which were in fact time bargains, the plaintiff had lost money in consequence of the frauds of which he complained. The plaintiff by his bill sought to have all the contracts into which he had entered with the directors cancelled, and to be repaid all the monies paid by him under those contracts. To this bill the company demurred; and the demurrer was allowed on the ground that the frauds complained of were, according to the plaintiff's own statements, such as could not be attributed to the company, but only to the individuals who were concerned in their perpetration. The company had done nothing in order to induce the plaintiff or any one else to speculate in its shares; the company knew nothing of the plaintiff nor of his dealings, and had not in any way been benefited thereby; the damage moreover sustained by the plaintiff was too remote to be attributed to anything imputable to the company. The Vice-Chancellor observed that "if this were the case not of a company and its directors, but of an individual principal and of his agent, the principal could never be held responsible in the manner for which the plaintiff contends."

Frauds on Stock Exchange.

Barry *v.* Croskey.

Further, it has been decided that a company is not responsible for those acts which can only be regarded as fraudulent by reason of § 38 of the Companies act, 1867, and which are *by that act to be treated as fraudulent on the *324 part of the directors or promoters. (*z*)

Companies act, 1867, § 38.

Whatever doubt there may be as to the liability of a company for the frauds of its officers, there is fortunately none as to the personal liability of directors for frauds per-

Personal liability of directors.

(*y*) 2 J. & H. 1.

(*z*) See Gover's case, 1 Ch. D. 182, *ante*, p. 116.

petrated by themselves. (*a*) Directors and others who circulate false prospectuses and reports, with a view to induce people to take shares, are answerable in damages to those who take shares on the faith of such reports (*b*)[1], and an action for misrepresentation is sustainable, although the prospectus or report relied on was not the sole inducement to the plaintiff to take shares (*c*); and although there may have been no immediate communication between the plaintiff and the defendant (*d*), and although the defendant may have been only a servant of the company. (*e*) Nor is there any difference in this respect between a fraudulent concealment of a material fact and an actual misrepresentation. (*f*) Such an action, moreover, is sustainable in Scotland and perhaps in England against executors for the fraud of their testator. (*g*)

And upon principle it is conceived that the directors of a company are personally liable for any torts committed by the company with their express sanction. It was held in a case in which a company infringed a patent, that the directors were personally liable to the costs of a suit to restrain the infringement. (*h*)

The personal liability of directors and others under § 38 of *325 *the Companies act, 1867, in respect of the issue of prospectuses which are by that act to be deemed fraudulent, has been already considered. (*i*)

(*a*) See 24 & 25 Vict. c. 96, §§ 82–85, noticed *infra*, book iii. ch. 8, § 3, as to criminal responsibility.

(*b*) Peek *v.* Gurney, 13 Eq. 79; Gerhard *v.* Bates, 2 E. & B. 476; Burnes *v.* Pennell, 2 H. L. C. 497. See, also, Denton *v.* Great Northern Rail. Co. 5 E. & B. 860; and Williams *v.* Swansea Harbor Trustees, 14 C. B. N. S. 845. See Weir *v.* Barnett, 3 Ex. D. 32, where it was held that directors are not liable for false statements put into a company's prospectus without their knowledge, although the company itself may be so liable as the real principal of the persons guilty of the fraud; and although the directors may indirectly have benefited by the fraud. The case is under appeal.

[1] See Cooley on Torts, 494.

(*c*) Clarke *v.* Dickson, 6 C. B. N. S. 453; Cleveland Iron Co. *v.* Stephenson, 4 Fos. & Fin. 437.

(*d*) Peek *v.* Gurney, 13 Eq. 79; Clarke *v.* Dickson, 6 C. B. N. S. 453; Bedford *v.* Bagshaw, 4 H. & N. 538; Bale *v.* Cleland, 4 Fos. & Fin. 117.

(*e*) Cullen *v.* Thompson, 4 McQu. 424.

(*f*) Peek *v.* Gurney, 13 Eq. 79.

(*g*) Davidson *v.* Tullock, 3 McQu. 783, Peek *v.* Gurney, 13 Eq. 79; New Sombrero Phosphate Co. *v.* Erlanger, 5 Ch. D. 73.

(*h*) See Betts *v.* De Vitre, 5 N. R. 165, and 3 Ch. 441; and see an article in 10 Jur. N. S. (part 2), p. 475.

(*i*) *Ante*, pp. 115–116.

SECTION V.—LIABILITY OF PARTNERSHIPS AND COMPANIES IN RESPECT OF ACTS WHICH ARE UNAUTHORIZED AND ARE KNOWN SO TO BE.

1. *As regards partnerships.*

Excess of authority.

By law every member of an ordinary partnership is the agent of the firm, so far as is necessary for the transaction of its business in the ordinary way, and to this extent his authority to act for the firm may be assumed by those who know nothing of the real limits of his authority. If his co-partners have restricted his authority to narrower limits (which they are perfectly at liberty to do (*k*),) still they will be bound to all persons dealing with him *bonâ fide* without notice of the restriction, so long as he acts within the wider limits set by law as above explained.[1] On the other hand, if a person seeks to fasten upon the firm liability in respect of some act of one of the members which does not fall within the limits of his authority as set by law, a more extensive authority must be shown to have been actually conferred upon him by the other partners; and if no sufficient authority can be shown, the firm will not be liable, even though the person seeking to charge it had no notice of the real authority possessed by the partner with whom he dealt.[2]

Notice of want of authority.

The immateriality of notice of want of authority in the last case and its materiality in the former, is a necessary consequence of the law of agency. A firm can only be made liable for what is done by one of its members on the supposition that the act in question was authorized by the other members.

(*k*) See *infra*.

[1] U. S. Bank *v.* Binney, 5 Mason, 176; Frost *v.* Hanaford, 1 E. D. Smith, 540; Williams *v.* Rogers, 14 Bush, 777; Medberry *v.* Soper, 17 Kan. 369; National Union Bank *v.* Landon, 66 Barb. 189; Bank of Rochester *v.* Monteath, 1 Den. 402.

In a special partnership, the power of each partner, in regard to dealings with third persons who have notice of the terms, is special. If, however, the terms are violated and the transaction enures to the benefit of the partnership, the partnership is liable. Johnson *v.* Bernheim, 76 N. C. 139.

[2] A party who deals with a partner in matters outside the business of the firm, can acquire no claim against the partnership, unless he can prove a previous authority for, or a subsequent ratification of the partner's act; and this cannot be implied from the mere fact of partnership. Selden *v.* Bank of Commerce, 3 Minn. 166. See *ante*, 236, note.

Now, as by law, they are held *primâ facie* to authorize all acts necessary for carrying on the business of the firm in the usual way, they cannot escape liability for any act of this character *326 *unless they can show that the apparent authority to do it did not exist, and could not have been relied upon, because its non-existence was known. But when it is sought to make the firm liable for some act not *primâ facie* authorized by it, an actual authority by it must be shown; and if this cannot be done, no case is made out against the firm, however ignorant the person seeking to charge it may have been of what was authorized and what was not. In the case now supposed the firm did not mislead him; and if he was misled by the representations of the partner with whom he dealt, his remedy is against that partner (*l*); just as when an agent untruly represents his authority, a person, dealing with him, acquires no right against the principal, but must look to the agent for indemnity. (*m*)

From the above observations it follows that actual notice of excess of authority becomes important only where the firm seeks to escape liability for some act done by one of its members, with the apparent, but without the real authority of the others. So long as one partner does nothing beyond the scope of his apparent authority, as determined by the principle already explained, so long is the firm responsible for his conduct, although he may have acted beyond or in direct violation of the authority within which his copartners may have attempted to confine him. Restrictions placed by the partners upon the powers which each shall exercise do not affect non-partners, who act *bonâ fide* and without notice of the restriction. (*n*) If, for example the business of a firm requires a subdivision of labor, and it is agreed between the partners that one shall attend to one department and another to another, the firm will nevertheless be bound by the acts of one of the partners out of his department, provided they are such as, on the principles already explained, would be binding on the firm. (*o*)

(*l*) *Ante*, p. 314, *et seq.*; see, too, Lloyd *v.* Freshfield, 9 Dowl. & Ry. 19.

(*m*) See, as to the liability of the agent in such a case, Collen *v.* Wright, 7 E. &. B. 301, and cases of that class, noticed *infra*, in book ii. ch. 2, § 1.

(*n*) As regards such persons, it is of no use for one partner to tell the others he will not be bound by their acts. See Gleadon *v.* Tinkler, Holt, N. P. Ca. 586. It is otherwise where there is notice. See *Ex parte* Holdsworth, 1 M. D. & D. 475.

(*o*) Morans *v.* Armstrong, Arm. Mc-Art. & Ogle, Ir. N. P. Rep. 25.

*So, if one partner acts in fraud of his co-partners, still they will be bound, if he has not exceeded his apparent authority, and if the person dealing with him had no notice of the fraud. Thus in Bond v. Gibson (*p*), where one partner ordered goods on the credit of the firm, and immediately pawned them for his own benefit, the firm was held liable for the price of the goods. So, if one member of an ordinary trading partnership draws, accepts, or indorses a bill in the name of the firm, but for some private purpose of his own, and in fraud of his co-partners,[1] they will be liable upon the bill at the suit of any holder for value, without notice of the fraud. (*q*) So, as has been already seen, if one partner fraudulently misapplies money for which the firm is answerable, the firm is liable to make it good, although the other partners may have been grossly deceived, and may themselves have been morally blameless. (*r*) *327

Cases of fraud on firm, but no notice of it. Bond v. Gibson.

Upon the same principle, if a person known to be a partner retires, and does not notify his retirement, he will continue to be bound by the acts of his late partners as if his partnership with them continued. (*s*)[2]

Liability of retired partner in the absence of notice.

On the other hand, a person who has notice that the authority of a partner is restricted, cannot hold the firm liable if he chooses to deal with that partner in a matter beyond his authority as restricted (*t*).[3] Therefore, where

Cases of restricted authority and notice of it.

(*p*) 1 Camp. 185.

[1] See *ante*, 266, note.

(*q*) *Ex parte* Bushell, 3 M. D. & D. 615; *Ex parte* Meyer, De Gex, 632 (an accommodation Bill); Lane *v.* Williams, 2 Vern. 277; Wintle *v.* Crowther, 1 Cr. & J. 316; Thicknesse *v.* Bromilow, 2 ib. 425; Ridley *v.* Taylor, 13 East, 175; Sanderson *v.* Brooksbank, 4 Car. & P. 286; Lewis *v.* Reilly, 1 Q. B. 349; Sutton *v.* Gregory, 2 Peake, 150; Swan v. Steele, 7 East, 210. See, as to the plea of non accepit, Jones *v.* Corbett, 2 Q. B. 828. It is now settled that if a bill is drawn or accepted by one partner in fraud of the firm, the holder cannot recover against the firm unless he can show that he gave value for the bill. Hogg *v.* Skene, 18 C. B. N. S. 426; explaining Musgrave *v.* Drake, 5 Q. B. 185, which was supposed to be to the contrary. See, also, Bailey *v.* Bidwell, 13 M. & W. 73; Smith *v.* Braine, 15 Jur. 287, Q. B.; Harvey *v.* Towers, 6 Ex. 656; Berry *v.* Alderman, 14 C. B. 95; Heath *v.* Sansom, 2 B. & Ad. 291.

(*r*) *Ante* p. 302, *et seq.*

(*s*) This subject will be alluded to hereafter.

[2] See, *post*, 406 and note.

(*t*) Alderson *v.* Pope, 1 Camp. 404, stated and observed upon hereafter.

[3] Knox *v.* Buffington, 50 Iowa, 320.

If a firm consists of but two partners; each having an equal voice in the direction and control of the common business, either may protect himself against liability on a future contract, by giving notice of his dissent to the person with whom it is about to be made; and

the defendant, who was in partnership, sent the plaintiff a circular telling him not to supply goods to the firm without the *328 defendant's written order, *and the plaintiff, notwithstanding, supplied goods to the defendant's partner, it was held that the defendant was not liable for the goods. (*u*) So, the authority of any partner to accept bills in the partnership name may be determined by a public notice, and such notice will affect those whom it reaches, subject to the qualification that an indorsee with notice may avail himself of the ignorance of his indorser. (*x*)

In Galway v. Mathew (*y*) the defendants, Mathew and Smithson, were partners; Smithson caused an advertisement to be published warning all persons not to give credit to Mathew on his, Smithson's account, and stating that he would not be liable for any bills or notes issued by Mathew in the name of the partnership. The plaintiff had seen this advertisement, but he was nevertheless prevailed upon by Mathew to accept a bill for

Galway v. Mathew.

where the partnership consists of more than two persons, one of whom gives notice of his dissent, the party contracting with the others acts at his peril, and cannot hold the dissenting party liable, unless his liability results from the articles, or from the nature of the partnership. See Johnston *v.* Dutton, 27 Ala. 245. Monroe *v.* Conner, 15 Me. 178; Matthews *v.* Dare, 20 Md. 248; Leavitt *v.* Peck, 3 Conn. 124; Yeager *v.* Wallace, 57 Penn. St. 365; and the cases cited below.

If one of two attorneys constituting a firm, practicing only in the city of Baltimore, receives from one aware of this limitation, a note for collection in Carroll county, the firm will not be responsible unless the privity of the other partner is shown. Brent *v.* Davis, 9 Md. 217.

One partner cannot, in violation of known stipulations in the articles of partnership, bind the firm even for money which is applied in liquidation of the debts of the firm. Langan *v.* Hewett, 21 Miss. 122.

C. and H. were partners; C. was to furnish the capital, H. the labor. W., who knew of the agreement between the partners, agreed with H. to perform labor for the use and benefit of the partnership: *Held*, that C. was not liable for the value of the labor performed by W. Pollock *v.* Williams, 42 Miss. 88.

Where, in a partnership to work a farm, it was agreed that each partner was to supply and pay for his portion of labor, and a laborer who contracted with one partner had knowledge of such agreement: *Held*, that he could not recover against the partnership in an action for services rendered on the farm. Urquhart *v.* Powell, 54 Ga. 29.

(*u*) Willis *v.* Dyson, 1 Stark. 164; Minnitt *v.* Whitney, Vin. Ab. Partn. A. pl. 12, & 5 Bro. P. C. 489. See, too, Vice *v.* Fleming, 1 Y. & J. 227; *Ex parte* Holdsworth, 1 M. D. & D. 475.

(*x*) Rooth *v.* Quin, 7 Price, 193.

(*y*) 1 Camp. 402, and 10 East, 264. See, too, *Ex parte* Holdsworth, 1 M. D. & D. 475, where the drawer of bills accepted by the firm had notice that they were accepted without authority.

the accommodation of the firm, taking in exchange a promissory note drawn by Mathew in the name of the firm. Mathew got the bill discounted, and *bonâ fide* applied almost all of the money thus procured in payment of the debts of the firm. The plaintiff paid his acceptance at maturity, and then brought an action against the firm on the note. But it was held that, having seen the advertisement, he could not recover.

Lord Ellenborough in that case said, "The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority, and that implication was rebutted in this instance by the notice given by Smithson, who is now sought to be charged, which reached the plaintiff, warning him that Mathew had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not *sue the others upon it in breach of *329 such stipulation, nor in defiance of a notice previously given to him by one of them that he will not be liable for any bill or note signed by the others."(z)

It will be observed that in these cases the notices were effectual though the partnership was not determined. The continuance of the partnership is not inconsistent with a notice by one partner that as to some particular matter he will not be bound by the acts of his co-partner. (a)

Restricted powers not inconsistent with continuance of partnership.

Again, a person who knows that a partner is using the name or assets of the firm for a private purpose of his own, knows that he is *primâ facie* committing a fraud on his co-partners. Therefore, notwithstanding the implied power of a member of an ordinary trading firm to accept bills or make notes, if one partner accepts a bill or makes a note in the name of the firm, and gives the bill or note in payment of a private debt of his own, the creditor who takes the bill or note,

Bills accepted in name of firm for private debt.

(z) It was also sought in this case to make the firm liable because it had had the benefit of the plaintiff's money. But this was met by the question, "Can an *assumpsit* be raised by one man's discharging the debt of another who desires him not to do it on his credit?" This point will be alluded to hereafter. See § 7, *infra*.

(a) See, in addition to the cases cited in the last few notes, the judgment of L. J. Bramwell in Bullen *v.* Sharp, L. R. 1 C. P. pp. 125–6, and the judgment in Vice *v.* Fleming, 1 Y. & J. 227.

knowing the circumstances under which it has been accepted or made, will not be able to enforce it against the firm, unless it was, in fact, given with the authority of the other partners, which it is for the creditor to prove. (*b*)[1] And if a bill is drawn by one part-

(*b*) Leverson *v.* Lane, 13 C. B. N. S. 278, and 3 Fos. & Fin. 221; *Re* Riches, 5 N. R. 287. See, also, Ellston *v.* Deacon, L. R. 2 C. P. 20. Older cases to the same effect are Wells *v.* Masterman, 2 Esp. 371; Green *v.* Deakin, 2 Stark. 347; *Ex parte* Thorpe, 3 M. & A. 716; *Ex parte* Austen, 1 M. D. & D. 247; Arden *v.* Sharpe, 2 Esp. 524; *Ex parte* Agace, 2 Cox, 312, Miller *v.* Douglas, 3 Ross, L. C. 500; *Ex parte* Bonbonus, 8 Ves. 540; Frankland *v.* M'Gusty, 1 Knapp, 274; and see post, p. 331.

[1] Ranst *v.* Hanselt, 41 N. Y. Superior Ct. 467; Clay *v.* Cottrell, 18 Penn. St. 408; King *v.* Faber, 22 Penn. St. 21; Bank of Commerce *v.* Selden, 3 Minn. 155; Taylor *v.* Hillyer, 3 Blackf. 433; Hickman *v.* Reineking, 6 Id. 388; Maudlin *v.* Branch Bank, 2 Ala. 502; Robinson *v.* Aldridge, 34 Miss. 352; Hickman *v.* Kunkle, 27 Mo. 401; Stainer *v.* Tysen, 3 Hill, 279; Miller *v.* Manice, 6 Id. 115; Weed *v.* Richardson, 2 Dev. & B. L. 535; Baird *v.* Cochran, 4 Serg. & R. 397; Porter *v.* Gunnison, 2 Grant Cas. 297; Burleigh *v.* Parton, 21 Tex. 585; Huntington *v.* Lyman, 1 D. Chip. 438; Cotton *v.* Evans, 1 Dev. & B. Eq. 284; Lanier *v.* McCabe, 2 Fla. 32; Munroe *v.* Cooper, 5 Pick. 412; Williams *v.* Wallbridge, 3 Wend. 415; Davenport *v.* Runlett, 3 N. H. 386; Gansevoort *v.* Williams, 14 Wend. 133; Wilson *v.* Williams, Id. 146; Foster *v.* Andrews, 2 Pa. 160; Powell *v.* Messer, 18 Tex. 401; Williams *v.* Gilchrist, 11 N. H. 535; Tompkins *v.* Woryard, 5 W. Va. 216. See, also, Wagner *v.* Clay, 1 A. K. Marsh, 257; Cooper *v.* McClurkan, 22 Penn. St. 80; Rutledge *v.* Squires, 23 Iowa, 53; *ante*, 266, note.

One partner cannot bind his firm by signing the partnership name in renewal of a premium note given by such partner in the name of the firm for a policy of insurance upon his individual property. Lime Rock, etc., Ins. Co. *v.* Treat, 58 Me. 415.

If money is borrowed by a partner in his own name, and on his own credit, and his individual note is given therefor, it is no fraud afterwards to execute the note of the firm in renewal, provided the money goes into the business of the firm. Union Bank *v.* Eaton, 5 Humph. 499.

If it is within the ordinary course of a partnership business for one partner to borrow money on the credit of a firm, proof that a loan is made to the firm, at their place of business through one of the partners, at six per cent., upon a statement by the latter that the firm could use the money to advantage at that rate; that the lender took a transfer of bank stock as collateral security; and that he knew that the partner with whom he transacted the business owned real estate, in which the firm was not interested—is not sufficient to affect the lender, if he acted in good faith, with constructive notice of fraud in such partner, in procuring the money for his own personal use. Warren *v.* French, 6 Allen, 317.

It is not competent to charge a firm for the act of a partner in giving firm security for an indorsement of his individual note, by evidence that at the time of obtaining the indorsement the partner stated that the money was wanted for the use of the firm. Uhler *v.* Browning, 28 N. J. L. 79.

In an action upon a note, signed by one of two partners, in the partnership name, for a purpose not connected with

ner in the name of the firm in fraud of his co-partners, and is accepted by the drawee, and is afterwards indorsed by the drawer in the name of the firm, the acceptor may successfully deny the indorsement, although he cannot deny the drawing. (*c*)

the partnership, and without the knowledge of the other partner, testimony tending to show a subsequent recognition of the note by the latter is within the exclusive jurisdiction of the jury to weigh. Jones *v.* Booth, 10 Vt. 268.

Where one of two partners, during the existence of the partnership, gave a promissory note in the name of the firm for his private debt; and the other partner afterwards, knowing these facts, by a promise to pay the note induced the holder to forbear attempting to collect it: *Held*, that a jury should be warranted in returning a verdict against both in an action on the note, without expressly finding that the note had been ratified by the other partner. Wheeler *v.* Rice, 8 Cush. 205.

The rule stated in the text is the same in the case of an accommodation indorsement by one partner in the name of the firm. Bank of Tenn. *v.* Saffarans, 3 Humph. 597; Fielden *v.* Lahens, 9 Bosw. 436; Whitmore *v.* Adams, 17 Iowa, 567; Elliott *v.* Dudley, 19 Barb. 326.

Where one member of a partnership, in order to pay his individual debt, makes his promissory note and indorses it in the firm name, without the knowledge or consent of his co-partners, and his creditor, with knowledge of the facts, receives the note, and in order to bind the firm transfers it before maturity to a *bonâ fide* holder, the creditor is guilty of a fraud and is liable therefor. But the fraud is not upon the firm; it is only upon those who did not consent to the indorsement. Hence, the cause of action arising therefrom is no part of the assets of the firm, although the note has been paid out of such assets; and title thereto does not pass by a general assignment of all the property and effects of the firm, nor is any interest therein conveyed by an assignment made by one of the parties injured of his right and interest in the partnership assets. Calkins *v.* Smith, 48 N. Y. 614.

B, a member of a firm of whch he and A were partners, fraudulently made a promissory note in the name of the firm and delivered it to C, who had knowledge of the fraud. C delivered it to D, an innocent holder, for value. The firm was afterwards dissolved and a receiver appointed. D brought an action at law upon the note. A then brought a bill in equity against B and C, the prayer of which was that C might be ordered to pay, take up, and cancel the note and restrained from enforcing it: *Held*, that the bill could not be maintained. Fuller *v.* Percival, 126 Mass. 381.

B, a member of a firm of which he and A were partners, fraudulently made a promissory note in the name of the firm, and delivered it to C, who had knowledge of the fraud. The firm was afterwards dissolved and a receiver appointed. A, after the note became due, and while it was still in the hands of C, no suit having been begun on it, brought a bill in equity against B and C, the prayer of which was that C might be ordered to produce and cancel the note and be restrained from enforcing it: *Held*, that the bill could be maintained. Fuller *v.* Percival, *supra*.

One partner, without consent of his co-partner, cannot indorse a partner-

(*c*) Garland *v.* Jacomb, L. R. 8. Ex. 216.

*330 *Again, although a partner may be a *bonâ fide* holder, for his own separate use, of the paper of his firm, yet if he gives such paper in payment of a separate debt of his own, this is *primâ facie* an irregular proceeding and a fraud on his co-partners. Consequently, the creditor taking the paper must rebut this *primâ facie* inference before he can compel the firm to pay. (*d*) A *bonâ fide* holder for value without notice is of course in a different position. (*e*)

ship note belonging at the time to the firm, in payment of an individual debt. Fletcher *v.* Anderson, 11 Iowa, 228; Fall River, &c., Bank *v.* Sturtevant, 12 Cush. 372.

Where a promissory note belonging to a partnership, is transferred or paid over by an individual member thereof, in satisfaction of his own private debt, it is incumbent on the plaintiffs, in a suit brought on the note, to show the assent of the other partner in order to bind him; and such knowledge and assent must be clearly shown, and not left to be inferred from vague and slight circumstances. Kemeys *v.* Richards, 11 Barb. 312; Mecutchen *v.* Kennady, 27 N. J. L. 230.

One partner cannot, without the express concurrence of his co-partner, make a note of the firm payable to himself, and charge the firm therewith. Brown *v.* Haynes, 6 Jones, Eq. 49.

Where a partner in two firms draws a bill by one firm on the other, payable to himself, for his individual debt, which is accepted by the firm, such bill cannot be recovered by the payee against the drawers or acceptors. Babcock *v.* Stone, 3 McLean, 172.

If a partner draws notes in the name of the firm, payable to himself, and then indorses them to a third party for a personal, and not a partnership consideration, the first indorsee cannot maintain an action on them against the firm, if he knew that the notes were antedated. Smyth *v.* Strader, 4 How. 404.

An indorsee of a note, indorsed by one of several partners, in the partnership name, for his individual purposes, without the consent or knowledge of the other partners, cannot avail himself of such note to subject the partnership, even if he did not know that it was indorsed under such circumstances, where his ignorance arises from gross negligence. New York Fire Ins. Co. *v.* Bennett, 5 Conn. 574.

An indorsee who received, six months after date, as collateral security, from the payee, a note on demand, given in the name of a partnership to one of the firm, takes it subject to all the equity existing against it in the hands of the payee. Thompson *v.* Hale, 6 Pick. 259.

A note was indorsed by a firm and pledged by them as collateral security to a creditor, whose claim was afterwards paid by A, one of the firm, with his own money, and the note was delivered by the creditor to him. Subsequently, and after the dissolution of the partnership, but before the maturity of the note, A delivered it, with the partnership indorsement still remaining

(*d*) See Leverson *v.* Lane, 13 C. B. N. S. 278, and *Re* Riches, 5 N. R. 287, qualifying *Ex parte* Bushell, 3 M. D. & D. 615, and Ridley *v.* Taylor, 13 East, 175, in which the contrary doctrine was countenanced.

(*e*) See *ante*, p. 327.

As a partner has no implied authority to pledge the partnership name for purposes of his own, so neither has he, for similar purposes, any implied power to pledge its goods.[1] Therefore, if two firms are jointly interested in consignments, and one of them pledges the bills of lading with its bankers as a security for advances on its separate account, the bankers cannot hold those goods against the other firm, if they knew when the goods were pledged what the real facts were respecting them. (*f*) So, if one partner pays a separate debt of his own with money of the firm, and the creditor who is paid is aware of the facts, he cannot retain the money as against the firm, unless he can prove that the payment was authorized by the other partners. (*g*)

Pledge of partnership goods for private debt.

thereon, to B, in payment of his own individual debt: *Held*, that the partnership indorsement became legally extinct when A paid the pledgee's claim, and that the firm were not liable to B upon the note as indorsers. Dana *v.* Conant, 30 Vt. 246.

The plaintiff, at the request of M., a member of the firm of M. & H., made an accommodation note payable to the order of the firm, and delivered it to M., taking from M. in exchange therefor a note of the same amount, executed by M. in the partnership name, the plaintiff supposing that his note was to be used for the benefit of the firm. M., however, without the knowledge of his partner, indorsed it in the partnership name, and delivered it to G. in payment of a private debt, G. taking it with full knowledge of all the facts. When the plaintiff's note fell due, he learned the facts with regard to the fraudulent use made of it. He, however, gave a new note to G. for the amount due, and took up the former one, surrendering also to M. the note which he held against M. & H., and taking a new note of the same amount with his own, executed by M. in the name of the firm. The plaintiff afterwards paid his note when it fell due. In a suit brought by him against M. & H. on the note last taken by him and for money paid to their use, it was *held:* 1. That the arrangements between M. and G., under which the latter received the original note of the plaintiff, indorsed in the partnership name, in payment of his private claim against M. was a fraud on the other partner, and that G. obtained thereby no right to the note, either against the firm or the plaintiff. 2. That as the plaintiff had full knowledge of the facts when he gave his new note, and took a new note in the name of the firm, he could not recover upon the latter note against the firm. 3. That as the plaintiff was not legally liable to pay G. the note originally given by him, his payment of the same, either in cash or by giving a new note, would give him a right to recover the amount as money had to the use of the firm. Mix *v.* Muzzy, 28 Conn. 186.

[1] See *ante*, 284 and note.

(*f*) Snaith *v.* Burridge, 4 Taunt. 684.

(*g*) Kendal *v.* Wood, L. R. 6 Ex. 243; Heilbut *v.* Nevill, L. R. 4 C. P. 354, and and 5 id. 478. See further as to such cases, *ante*, pp. 211-212.

Another case, illustrating the want of authority of one partner to bind the firm by transactions enuring only to his advantage, is afforded by Bignold *v.* Waterhouse. (*h*) There the defendants were proprietors of a coach running between London and Norwich, and they, by notice affixed in their office, stated that they would not be accountable for any any parcel above the value of 5*l.*, unless the same was entered and paid for accordingly. The plaintiffs were bankers at Norwich, and one of the defendants, for a consideration moving to him alone, agreed that the plaintiffs' parcels should always go free by the coach.

Private bargain by one partner.

Bignold *v.* Waterhouse.

This agreement was acted on for some time, but it did *331 *not appear that the other defendants were aware of its existence, or of the fact that the plaintiffs were treated differently from other people. A parcel of the plaintiffs' sent by the coach being lost, it was held that the contract entered into by the one defendant was not binding on the others, and that they were not liable for the loss of the parcel, its value not having been declared as required by the notice.

The same principle was acted upon in the important and well-known case of Shirreff *v.* Wilks. (*i*) There the plaintiffs sold some porter to Bishop and Wilks, who were partners; and the porter was entered in the plaintiffs' books in the names of Bishop and Wilks. Afterwards, Robson became a partner with Bishop and Wilks, and the plaintiffs, knowing this, drew a bill on all three partners for the price of the porter, and Bishop accepted the bill in the name of the three. It was held that Robson was not liable on this bill, there being no evidence to show that he knew anything of it. Lord Kenyon went so far as to say that the transaction was fraudulent on the face of it; but that is going rather far, as it is not uncommon for incoming partners to agree to take upon themselves the existing liabilities of the firm. When such an agreement is entered into, the incoming partner can hardly say he has been defrauded, if a bill in the name of the new firm is accepted for a debt of the old firm, without any specific authority on his part. But if the creditor cannot show an authority on the part of the incoming partner for the acceptance of a bill in his name for a debt of the old firm, the prin-

Fraud on incoming partners.

Shirreff *v.* Wilks.

(*h*) 1 M. & S. 255.

(*i*) 1 East, 48.

ciple acted on in Shirreff *v.* Wilks will apply, for that case is clear law, and has often been followed as such. (*k*)

The doctrine that a person who deals with a partner, knowing that he is exceeding his authority, cannot impute the acts of that partner to the firm, is further illustrated by the decisions establishing the non-liability of a retired partner for acts done by his co-partners after notice of his retirement. These decisions will be examined at length hereafter.

Liability of retired partners after notice.

Granting that a person, knowing the limits of partner's *authority as set by his co-partners, *332 cannot hold them responsible for an act done by him in excess of his authority, it still remains to determine the effect of notice by non-partners of stipulations entered into between the partners themselves.

Notice of private stipulations of partners.

In Galway *v.* Mathew (*l*), Lord Ellenborough is reported to have said, "It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the other: *they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it in breach of such stipulation.*"

Galway *v.* Mathew.

Again, in Alderson *v.* Pope (*m*), the same judge held "that where there was a stipulation between A., B. and C., who appeared to the world as co-partners, that C. should not participate in profit and loss, and should not be liable as a partner, C. was not liable, as such, to those who had notice of this stipulation."

Alderson *v.* Pope.

These dicta appear to authorize the statement that if partners stipulate amongst themselves that certain things shall not be done, no person who is aware of the stipulation is entitled to hold the firm liable for what may be done by one of the members contrary to such stipulation. But it is submitted that this proposition is too wide. A stranger dealing with a partner is entitled to hold the firm liable for whatever that partner may do on its behalf within certain limits. To deprive the stranger of this right, he ought to have distinct notice that the firm will not be

Principle examined.

(*k*) See *ante*, p. 329, and *Ex parte* Goulding, 2 Gl. & Jam. 118; Wilson *v.* Lewis, 2 Man. & Gr. 197, and 9 Dowl. Pr. Ca. 18, *sub nomine* Wilson *v.* Bailey.

(*l*) 10 East, 264.

(*m*) 1 Camp. 404.

answerable for the acts of one member, even within these limits. (*n*) Now notice of an agreement between the members that one of them shall not do certain things, is by no means necessarily equivalent to notice that the firm will not be answerable for them if he does. For there is nothing inconsistent in an agreement between the members of a firm that certain things shall not be done by one of them, and a readiness on the part of all the members to be responsible to strangers for the acts of each other, as if no such an agreement had been entered into. It is immaterial to a *333 *stranger what stipulations partners may make amongst themselves, so long as they do not seek to restrict their responsibility as to him; and it is only when knowledge of an agreement between partners necessarily involves knowledge that they decline to be responsible for the acts of each other within the ordinary limits, that a stranger's rights against a firm can be prejudiced by what he may know of the private stipulations between its members.

Observations on Galway v. Mathew;

In Galway *v.* Mathew (*o*), the plaintiff's knowledge of want of authority was derived, not from notice of any agreement between the partners, but from an advertisement published by one of them, warning all persons that he would no longer be liable for drafts drawn by the others on the partnership account. (*p*) The passage, therefore, in the judgment, and extracted above, was by no means necessary for the decision of the case. With respect to Alderson *v.* Pope (*q*), if all that was meant was that a person knowing that C. did not authorize A. or B. to act on his behalf, could not hold C. liable for their acts, the case presents no difficulty; but if anything more than this was meant, the authority of the decision becomes at least doubtful: for it has been held in another case that a person who holds himself out as a partner with others with whom he has no concern, is liable for their acts, even to persons having notice of the true state of affairs; and the decision was based upon the very ground that a person, who holds himself out as a partner with others, expresses his readiness to in-

and on Alderson v. Pope.

Brown v. Leonard.

(*n*) See, as to the sufficiency of such notices, Vice *v.* Fleming, 1 Y. & J. 227.

(*o*) 1 Camp. 403, and 10 East, 264, and *ante*, p. 328.

(*p*) Distinct notice to the same effect existed in Minnitt *v.* Whitney, 16 Vin. Ab. 244, and 5 Bro. P. C. 489; Willis *v.* Dyson, 1 Stark. 164.

(*q*) 1 Camp. 404.

cur the responsibilities of a partner as regards strangers, whatever he may intend shall be the case between him and those with whom he associates his name. (*r*)

Private stipulations restrictive of liability.

Against the general proposition in question it may be further urged, that if partners agree not to be liable beyond a certain amount, and a stranger has notice of that agreement, the notice avails nothing against him.[1] Such an agreement, coupled with notice of it on the part of a person dealing with the firm, *is by no means equivalent to a contract between him and it, that he shall not hold the members responsible beyond the amount which they may have agreed between themselves to contribute respectively. (*s*) *334

Contracts on the basis of such stipulations.

The writer is not acquainted with any case in which it has been *decided* that persons who are aware of the terms upon which partners have agreed together to carry on business are deemed to contract with them upon the basis of the agreement come to amongst the partners themselves. In all cases of this description, the real question to be determined seems to be whether there was distinct notice that the firm would not be answerable to strangers for acts which, without such notice, would clearly impose liability upon it; and whenever there is any doubt upon this point, the firm ought clearly to be liable, the *onus* being on it to show sufficient reason why liability should not attach to it. (*t*)

2. *As regards companies.*

Notice as to limits of authority of directors.

The principles explained in the foregoing pages apply to companies as much as to partnerships, with the important qualification that the public is deemed to have notice

(*r*) Brown *v.* Leonard, 2 Chitty, 120.

[1] A private agreement between partners in relation to a particular transaction, although binding as between themselves, does not affect their liability to the public or to third persons without notice thereof, and therefore evidence as to such agreement is irrelevant. Maltby *v.* Northwestern, etc. R. R. Co., 16 Md. 422; Cargill *v.* Corby, 15 Mo. 425; Perry *v.* Randolph, 14 Miss. 335; Nichols *v.* Cheairs, 4 Sneed, 229; Tillier *v.* Whitehead, 1 Dall. 269; Devin *v.* Harris, 3 Iowa, 186; Barber *v.* Mann, 5 Bush, 672; Lawrence *v.* Kinsting, 1 Mont. Ter. 290; Everett *v.* Chapman, 6 Conn. 347.

See, *ante*, 327, note.

(*s*) See Greenwood's case, 3 DeG. M. & G. 476.

(*t*) See Hawken *v.* Bourne, 8 M. & W. 703, where the defendant was held liable for goods supplied to a mine, though the prospectus of the mining

of the limits of the authority conferred upon the directors of a company by its act of Parliament, charter, or registered deed of settlement. (*u*) It follows from this:—

1. That acts which are *ultra vires*, *i. e.*, acts which the company, as established, cannot lawfully do in any way (*x*), do not bind the company, whether they are actually known to be so or not.

2. That acts which are not *ultra vires*, but which are nevertheless done irregularly, bind the company as between it and *335 *strangers dealing with its agents *bonâ fide*, and without notice of the irregularity; but

3. That acts of this last description do not bind the company as between it and strangers dealing with its agents, and having notice of the irregularity, either actually or constructively, by the circumstance that the irregularity would have been known had attention been paid to the company's act of Parliament, charter, or registered deed.

The cases upon this subject having been already examined (*y*), it is unnecessary in the present place to allude to them again. The first proposition is the necessary result of the doctrine, that corporations created for some definite purpose cannot lawfully engage in anything foreign to such purpose; the second is established by The Royal British Bank *v.* Turquand, and cases of that class (*z*); and the third is established by the decisions which are in conformity with the judgment of Lord Wensleydale in Ernest *v.* Nicholls. (*a*)

Companies which are mere partnerships.

With respect to companies which have no act of Parliament, charter, or registered deed, and which are therefore substantially nothing more than large partnerships, the affairs of which are conducted by a few individuals, it is conceived that the public has no constructive notice of their regulations. As between such companies and persons dealing *bonâ fide* with their directors without actual notice of the real authority conferred upon them, their authority must be treated as limited only by the usual partnership test of what is necessary for carrying on the business of the company in the ordinary way. (*b*)

company stated that all goods were to be bought for cash prices and no debt was to be incurred.

(*u*) See *ante*, p. 252.

(*x*) The term *ultra vires* is sometimes applied to acts which can only be properly done in a certain way, and which have been done in some other way. This double use of the term is apt to lead to confusion.

(*y*) *Ante*, p. 249, *et seq.*

(*z*) *Ante*, p. 253.

(*a*) 6 H. L. C. 401; *ante*, p. 252, note (*r*).

(*b*) See Hawken *v.* Bourne, 8 M. & W. 703.

*SECTION VI.—OF THE LIABILITY OF PARTNERSHIPS AND COMPANIES IN RESPECT OF CONTRACTS NOT ENTERED INTO ON THEIR BEHALF, OR NOT SO IN PROPER FORM. *336

Observations on foregoing propositions.

The general proposition that a partnership or company is bound by those acts of its agents which are within the scope of their authority, in the sense explained in the foregoing pages, must be taken with the qualification that the agent whose acts are sought to be imputed to the firm or company, was acting in his character of agent, and not as a principal. If he did not act in his character of agent, if he acted as a private individual on his own account, his acts cannot be imputed to the firm or company, and he alone is liable for them, even though the firm or company may have benefited by them. Whether a contract is entered into by an agent as such, or by him as a principal, is often, but not always, apparent from the form of the contract, and it is proposed in the present section to examine the effect of the form of a contract on the liability of partnerships, and then of companies.

1. *As regards partnerships and unincorporated companies.*

With reference to the forms of contracts, there is no difference between partnerships or unincorporated companies on the one hand, and ordinary individuals on the other. The same laws are applicable to both. So far, therefore, as partnerships and unincorporated companies are concerned, the form of a contract need only be considered in the present place with reference to its bearing on the question whether the contract is binding on the person who entered into it, or on other persons on whose behalf he may have acted. In order to determine this point it will be convenient to consider—

1. Contracts under seal.
2. Ordinary contracts not under seal.
3. Bills of exchange and promissory notes.

*337 *1. *Contracts under seal.*

A distinction is taken between deeds and other instruments with respect to the person bound by them. If a deed is executed by an agent in his own name, he and he only can sue or be sued thereon, although the deed may disclose the fact that he is acting for another. (c)[1] Therefore,

1. Covenants, &c.

(c) Appleton *v.* Binks, 5 East, 148; Pickering's case, 6 Ch. 525; and see next note.

[1] See the cases collected in Ewell's Evans on Agency, *172, note. See, also, generally, *ante*, 278, and note.

Where a contract of sale, which must by law be in writing, is made in writing under seal with one partner, who gives his bill single for the price of the thing purchased, the other partner cannot be sued upon the consideration. Harris *v.* Miller, 1 Meigs, 158.

If one partner borrows money on his own credit, and gives his sealed note for the amount, the firm is not liable, though the money be used in the partnership transactions. Willis *v.* Hill, 2 Dev. & B. L. 231.

So, where a partner buys real estate in his own name, and gives his individual bond and mortgage in part payment therefor, the firm is not liable to the seller for the unpaid purchase-money, though it appear by the firm books that the land was bought on firm account, and a declaration of trust was afterwards executed by the purchaser, but not recorded, declaring that the money paid was partnership funds, and that the land was held by him in trust as partnership property. North Pennsylvania Coal Co.'s appeal, 45 Pa. St. 181; See, also, Williams *v.* Gillies, 75 N. Y. 197; Patterson *v.* Brewster, 4 Edw. 352.

A lease from one of the co-partners, sealed with his seal, and, in terms, binding himself only, is not admissible evidence to support an avowry laying a demise by the co-partners, notwithstanding the deed is expressed as "for himself and his partner," and it is proved that the other party knew of the demise, and was satisfied with it. Tuttle *v.* Eskridge, 2 Munf. 330.

Two partners took an assignment of a lease of certain rooms, and afterwards one of them, A., by an agreement under seal, without the knowledge of the other, sub-let a part of the room and granted other privileges to the plaintiff for a term of three months beyond the termination of the lease. Subsequently the other partner sold his interest to B. A. and B. received rent from the plaintiff. At the termination of the first lease, the plaintiff was dispossessed, and brought an action of assumpsit against A. and B. for the damage he had sustained: *Held*, that the agreement under seal was not evidence in the action; that from the receipt of rent by A. and B. no contract could be implied against B., the incoming partner; and that none such was to be implied from the partnership. Bewley *v.* Tams, 17 Pa. St. 485.

A brought *assumpsit* against B and others whom A claimed to be co-partners of B, for goods furnished them under a sealed agreement, executed by A and B: *Held*, that an action would not lie as against B. A's claim rested on a specialty, and as B alone could not be made liable in *assumpsit*, so B, in company with others, could not be held in *assumpsit*.

where a partner or a director *covenants* that anything shall be done, he and he only is liable on the covenant, and the firm or company is not bound thereby to the covenantee. (*d*) A person who has to execute a deed as an agent, should take care that the deed and the

Semble, that if a partnership existed between B and his co-defendants, the partners who did not execute the sealed agreement could only be reached by a bill in equity filed by A. Boston & Col. S. Co. *v.* Smith, 22 Alb. Law Jour. 232.

A lease under seal, executed by one partner in the name of the firm as lessees, the firm occupying thereunder for two years, paying rent directly to the lessor, has been *held* to be evidence of an agreement for a lease, which, as they have had the benefit of it, will be enforced against the surviving partners after the death of him who executed it. Kyle *v.* Roberts, 6 Leigh, 495.

A writing under seal, executed by one partner in the name of the firm, is *held* admissible in an action of *assumpsit*, to prove a promise by the firm, if made on sufficient consideration. Fagely *v.* Bellas, 17 Pa. St. 67.

A contract was made, under seal, with a partnership, for building a dam; but it was executed by one only of the partnership, and without any authority from the other. The work was duly performed: *Held*, that *assumpsit* would lie against such partner, the work being within the scope of the partnership, and the supposed contracts with the firm having no legal existence as such. Van Deusen *v.* Blum, 18 Pick. 229.

A partner who has pleaded *non est factum* to a note under seal, executed by a partner without authority, is thereby estopped to deny his responsibility in a joint suit against himself and partners for the demand in *assumpsit*. Doniphan *v.* Gill, 1 B. Mon. 199.

If one partner, for the benefit of the partnership, executes a bond, with surety, which the surety is compelled to pay, he does not thereby acquire a right of action against the other partners. Tom *v.* Goodrich, 2 Johns. 213. See *ante*, 287, note.

Where money was lent to a firm, and the partner who conducted the transaction, by mistake executed a penal bond for the sum, in the name of the firm, instead of giving a promissory note therefor: *Held*, that, though at law the creditor had no remedy on the bond, except against the partner who executed it, yet equity would correct the mistake, and hold all the partners bound for the debt. Galt *v.* Calland, 7 Leigh, 594.

A vendor of goods, taking the bond of the vendee for the price, may afterwards file a bill for relief, on the ground that the purchase was on account of a partnership, of which the obligor was one. Spear *v.* Gillet, 1 Dev. Eq. 466.

So, where one partner hired slaves in his individual name, but in fact for the use of the firm which had the benefit of their labor, and he gave his individual bond with surety for the hire, on which judgment was subsequently recovered, and paid by the surety, who then filed his bill against his principal and his co-partners, on which it appeared that the principal in the bond was a non-resident of the State, and insolvent: *Held*, that the surety was entitled to a decree against his co-partners for the amount paid by him. Weaver *v.* Tapscott, 9 Leigh, 424.

In an action by a surviving partner on an obligatory writing given to a firm, the plea was, that the bond was not

(*d*) Hancock *v.* Hodgson, 4 Bing. 269; Hall *v.* Bainbridge, 1 Man. & Gr. 42.

covenants in it are expressed to be made not by him, but by the person intended to be bound. Thus, if A. is the principal and B. his agent, the deed and covenants should not be expressed to be made by B. for A., but by A.; and the execution in like manner should be expressed to be made by A. by his agent B. (*e*)

2. *Ordinary contracts not under seal.*

2. Ordinary simple contracts.

When a person enters into a contract as the agent of another, the name of that other may be either disclosed or not. If it is disclosed, the contract is treated as that of the principal and not as that of the agent (*f*);[1] whilst if it is not disclosed, the contract is considered as that of the agent. But in this last case, the person dealing with the agent can, when he discovers the undisclosed principal, hold him liable instead of the agent.(*g*)[2]

*338 *If, therefore, one partner only, enters into a written contract, the question whether the contract is confined to him, or whether it extends to him and his co-partners, cannot be determined simply by the terms of the contract. For supposing a contract to be entered into by one part

Firm liable though not named.

Written contracts.

given to the firm, but to the deceased partner in the firm's name. At the trial, the court instructed the jury that if they believed "from the testimony that the bond in evidence was given for a debt contracted prior to the dissolution of the partnership, the name of the partnership could be used after the dissolution, and the suit maintained by the surviving partner:" *Held*, that this instruction was unexceptionable. Stillwell *v.* Gray, 17 Ark. 473. See Survivorship, *post*.

A joint obligation under seal, executed by all the members of a firm, in its business and for its benefit, will be regarded as a co-partnership obligation and payable out of the firm assets, although the firm name is not mentioned therein, and it appears upon its face to be simply the obligation of the co-partners, contracted in their individual names. Berk. Woollen & Co. *v.* Julliard, 75 N. Y. 535.

(*e*) Combe's case, 9 Co. 76 b; Wilks *v.* Back, 2 East, 141.

(*f*) Fairlie *v.* Fenton, L. R. 5 Ex. 169; *Ex parte* Hartop, 12 Ves. 352; Russell *v.* Reece, 2 Car. & Kir. 669. But even in this case the contract may be so worded as to bind the agent. See Paice *v.* Walker, L. R. 5 Ex. 173; Calder *v.* Dobell, L. R. 6 C. P. 486.

[1] See Ewell's Evans on Agency, *177, note.

(*g*) See Paterson *v.* Gandasequi, 15 East, 62; Thompson *v.* Davenport, 9 B. & C. 78; and the note to those cases in 2 Smith, L. C. If a man contracts for "my principal," the principal, although undisclosed, and not the agent, is liable, unless there is some special custom rendering the agent personally liable. But if there be such a custom, the agent will be liable, see Fleet *v.* Murton, L. R. 7 Q. B. 126.

[2] See Ewell's Evans on Agency, *304, 308, 442, and notes.

ner in his own name only, still if in fact he was acting as the agent of the firm, his co-partners will be in the position of undisclosed principals; and they may therefore be liable to be sued on the contract, although no allusion is made to them in it.[1] This was expressly decided in the well-known case of Beckham v. Drake. (*h*) There, Drake, Knight and Sturgey were in

Beckham v. Drake.

(*h*) 9 M. & W. 79, and 11 M. & W. 315, overruling Beckham *v.* Knight, 4 Bing. N. C. 243.

[1] See Burnley *v.* Rice, 18 Tex. 481; Everett *v.* Chapman, 6 Conn. 347; Snead *v.* Barringer, 1 Stew. 134.

A, B and C entered into partnership in the business of tanning hides, stipulating, in the articles, that A should furnish hides for one-half of the stock necessary to keep the tannery in operation, and should receive and make market for one-half of the leather, and that B and C should furnish the other half of the stock, and receive and make market for the other half of the leather; and that in making purchases each should use his own credit separately. B purchased of D, in another state, a quantity of hides which D, being ignorant of the partnership, charged to B. individually. These hides were received at the tannery and manufactured into leather for the joint benefit of the partners. In an action of book debt brought by D against A B and C, as partners, to recover the value of these hides, it was *held*, that the manner in which the goods were in fact purchased and charged, did not preclude the seller from resorting to the partnership when discovered. Everett *v.* Chapman, 6 Conn. 347.

A written contract, in its caption, named "Charles W. Weeks" as one of the parties; in the body he was called "the said Charles Weeks," and in the subscription, at the end, he, as well as the other party, employed only the initials of his Christian name. In neither the body of the contract nor in the signatures was there any indication that it was the contract of a co-partnership. At the date of the contract C. W. Weeks was a partner in a firm doing business under the name of C. W. Weeks, but the matters included in the contract did not relate to the partnership business. There was no proof that the other party to the contract knew that C. W. Weeks represented a partnership firm until after the execution of the contract. The contract was drawn by Weeks, and in all the correspondence, etc., relating to it, the personal pronoun "I" was employed by him; the words "firm" or "we" not at all: *Held*, that this was the individual contract of C. W. Weeks, and not that of the firm of which he was a member. Marvin *v.* Buchanan, 62 Barb. 468.

Conversely, such undisclosed principals may sue upon such contract. See Ewell's Evans Agency, *308, note.

Thus, where one partner enters into a simple contract, though in writing, in his individual name, but in fact for his firm, although that fact is not known to the other contracting party, an action may be maintained on it in the name of the firm, by alleging that it was entered into by the firm by the name and style of the name of the one partner, each partner being the agent of the firm. Havana, etc., R. R. Co. *v.* Walsh, 85 Ill. 58.

Two partners may maintain a suit in the name of both for breach of a contract to transport property of the firm, though the same was executed only in the name of one, and the partners had sometimes signed in the name of both.

partnership as type-founders; but Drake was a secret partner. A written agreement relative to the partnership business was entered into between the plaintiff and Knight and Sturgey, and for a breach of this agreement by them the action was brought. Drake's name did not appear in the agreement; he did not sign it; nor when the contract was made was he known to the plaintiff to be a partner. It was nevertheless held that all three partners were liable jointly for a breach of the agreement, inasmuch as the agreement itself was clearly entered into by the firm, and Drake, like any other undisclosed principal, was liable to be sued as soon as his position was discovered.

Parol contracts.

In conformity with the same principle, if one partner acting in fact for the firm, orders goods and they are supplied to him, the firm will be liable to pay for them, although no mention was made of his co-partners, (*i*) and they were unknown to the seller of the goods. (*k*)[1] So, if A. in his own name only

Illinois, etc., R. R. Co. *v.* Owens, 53 Ill. 391.

A orders goods of B by letter; the co-partnership of which B was a member forwarded the goods to A, without a bill or letter, who received them, supposing them to have been forwarded by B individually: *Held*, that the co-partnership might maintain an action for goods sold and delivered against A. Child *v.* Wofford, 3 Ala. 564.

In an action brought by a tannery firm for a false warranty of a mule bought by one member thereof, without mention that it was for the firm: *Held*, that the burden of proof was on the defendant to sustain his motion for a non-suit, although there was no showing that the mule had ever been used in the tannery. Little *v.* Hamilton, Phill. Law, 29.

A mechanic's claim for a lien may be filed by a firm, one of whose members is named as the contractor. Chambersburg, etc. Manfg. Co. *v.* Hazelet, 3 Brews. 98.

A partner insured firm property in his own name, being assured by the agents of the company that this would cover the interest of the firm. Afterwards, the agents refused to correct the policy: *Held*, that the firm were entitled to have the policy reformed. Snell *v.* Atlantic, etc. I. Co. 18 Am. Law Reg. N. S. 79.

(*i*) City of Lond. Gas Lt. and Coke Co. *v.* Nicholls, 2 Car. & P. 365; Whitwell *v.* Perrin, 4 C. B. N. S. 412.

(*k*) Ruppell *v.* Roberts, 4 Nev. & Man. 31; Robinson *v.* Wilkinson, 3 Price, 538; Bottomley *v.* Nuttall, 5 C. B. N. S. 222.

[1] To the point that partners are liable for goods furnished for the use of the firm, though the vendor supposed himself dealing with, and giving credit to, an individual partner, not knowing of the existence of the firm. See Poole *v.* Lewis, 75 N. C. 417; Reynolds *v.* Cleveland, 4 Cow. 282; Roth *v.* Moore, 19 La. Ann. 86; Tucker *v.* Peaslee, 36 N. H. 167; Baxter *v.* Clark, 4 Ired. L. 127; Given *v.* Albert, 5 Watts & S. 333; Bisel *v.* Hobbs, 6 Blackf. 479; Griffith *v.* Buffum, 22 Vt. 181.

See, however, Watt *v.* Kirby, 15 Ill. 200; Sinklear *v.* Lambert, 5 Phila. 36.

underwrites a policy of insurance, but the profit or loss arising from the transaction is to be divided between him and B., both A. and B. will be liable to the insured. (*l*)

These cases establish the important proposition, that dormant partners are liable for the debts of the firm, *notwithstanding their connection with the firm was unknown to its creditors when the debts were contracted.[1] *339

Liability of dormant partners.

On the other hand, if one partner only is dealt with, and the circumstances are such as to show that he was acting and was dealt with on his own account, *i. e.*, as a principal, and not as the agent of the firm, he alone is responsible.[2]

One partner only liable, he only being dealt with.

(*l*) Brett *v.* Beckwith, 3 Jur. N. S. 331, M. R.

[1] A partnership for the manufacture of iron was composed of four persons, the names of two of whom did not appear, and these lived at a distance. The two acting partners bought land in their own name for the purpose of obtaining from it wood to be used in the manufacture of iron, and so far as it was paid for, it was paid for out of the partnership effects: *Held*, that the land was partnership property, and the partnership having failed, the two dormant partners were liable to the vendor for the balance of the purchase-money. Brooke *v.* Washington, 8 Gratt. 248.

See, however, *contra*, as to the liability of dormant partners in land. Gray *v.* Palmer, 9 Cal. 616.

[2] A co-partner may contract on his own account, and make himself alone liable for merchandise bought for the co-partnership account, if the vendor choose to accept him. Sylvester *v.* Smith, 9 Mass. 119; McDonald *v.* Parker, Ky. Dec. 245; Smith *v.* Hoffman, 2 Cranch. C. C. 651; Sinklear *v.* Lambert, 5 Phila. 36.

When no credit is given, and there is no expectation, originally, of looking to one partner for debts incurred by the other, no recovery against the former can be had. Chapman *v.* Devereux, 32 Vt. 616; Floyd *v.* Wallace, 31 Geo. 688. See, also, Watt *v.* Kirby, 15 Ill. 200.

Defendant's being a partner in a firm charged in book-account is not, of itself, conclusive of his liability in an action thereon, for it may be shown by parol on whose account the articles charged were delivered, and the parties were competent witnesses for themselves or each other to that point. Burton *v.* Ferris, Brayt. 78.

The fact of the creditors keeping their books and stating their accounts in the names of the firm with whom their dealings were had, without mentioning the defendant, who was also interested in the transaction, does not alone exonerate the defendant from his liability to them, nor manifest an intention to waive their claim upon him. Baring *v.* Crafts, 9 Metc. 380.

The plaintiff was employed by the defendant on his credit alone, to open and develop a coal mine on lands owned by the defendant with others. It not appearing that the other proprietors requested the defendant to engage in this enterprise, or authorized him to employ the plaintiff to perform this service: *Held*, that the mere fact that they were co-tenants with defendant in the land, was not enough to warrant the presump-

Examples.

Thus, where persons work a coach in partnership, each having his own horses, and one of them orders fodder on his own account, he alone is liable for it. (*m*) So, in the ordinary case of an agreement between an author and a publisher, to the effect that the publisher shall pay for the paper, printing, and other expenses of publication, and that after reimbursing himself and deducting a commission, the profits shall be divided equally, the author is not liable for the paper or printing which may have been supplied and executed for the publisher. (*n*)

Form of written contracts.

With respect to contracts in writing it is to be observed that a contract or other instrument required by statute to be in writing and signed by the party to be charged, only binds those partners who actually sign it (*o*); but if signature by the party to be charged, or his agent, is sufficient, the signature of one partner, in the name or on behalf of the firm, will bind all the partners. (*p*)

It is often a matter of difficulty to determine whether a particular contract is entered into by the firm through one of the partners or by that one partner only. There is nothing to prevent one person

tion that they were partners with him in his scheme to develop a coal mine upon it. Stannard *v.* Smith, 40 Vt. 513.

Where one co-partner makes a sale or disposition of the partnership property in his own name, and without disclosing the name of his co-partner or co-partners having an interest therein, at the same time warranting the soundness thereof, also in his own name, suit may be maintained against him for a breach of this warranty without joining his co-partner in the action. Cookingham *v.* Lasher, 38 Barb. 656; Clark *v.* Holmes, 3 John. 148.

Where a debt is contracted by one partner in his own name alone, in order to charge the firm, it must appear that the consideration was used by the firm with the knowledge and approbation of the defendant; or, that the debt was subsequently assumed by the firm. Nichols *v.* English, 3 Brews. 260.

Where money is loaned to members of a partnership on their individual contract, the fact that it is applied to the payment of partnership debts does not constitute the lender a creditor of the firm. National Bank *v.* Thomas, 47 N. Y. 15.

(*m*) Barton *v.* Hanson, 2 Taunt. 49. Mr. Collyer treats this as an exception, depending on particular custom, but this view is not correct. The law is the same in Scotland; see Jardine *v.* M'Farlane, 3 Ross. L. C. on Com. Law, 575.

(*n*) See the Scotch case of Venables *v.* Wood, 3 Ross. L. C. on Com. Law, 529; Wilson *v.* Whitehead, 10 M. & W. 503; but see Gardiner *v.* Childs, 8 C. & P. 345; where the paper was supplied for the specific book.

(*o*) Swift *v.* Jewsbury, L. R. 9 Q. B. 301, reversing Swift *v.* Winterbotham, 8 Q. B. 244.

(*p*) See Duncan *v.* Lowndes, 3 Camp. 478.

from entering into a contract *as a principal*, and yet for and on behalf of another (*q*); and when A. enters *into a contract for B., it may not be easy to say whether it is B. who contracts, or whether it is A. for B.'s benefit. And yet the true answer to this question determines whether B. is or is not liable on the contract.[1] The cases on this subject relate principally to bills of exchange and promissory notes, to which it is now proposed to pass. *340

3. *Bills of exchange and promissory notes.*

3. Bills and notes.

Although an ordinary contract not under seal, entered into by an agent for an undisclosed principal, is binding on that principal when discovered, and he can be sued upon it, the same rule does not apply to bills of exchange and promissory notes. For, subject to the qualification that the name of a firm is equivalent to the name of all the persons composing it (*r*), no person whose name is not on a bill or note is liable to be sued upon it. (*s*) In order, therefore, that a bill or note may be binding on a firm, the name of the firm must be upon it; and if the names of one or more of the partners only are upon it, the others will not be liable to be sued upon the instrument, whatever may be their liability as regards the consideration for which it may have been given. (*t*)[2]

(*q*) See, in addition to the cases cited hereafter, Paice *v.* Walker, L. R. 5 Ex. 169; Tanner *v.* Christian, 4 E. & B. 591; Cooke *v.* Wilson, 1 C. B. N. S. 153; Parker *v.* Winlow, 7 E. & B. 942. See, also, Kay *v.* Johnson, 2 Hem. & M. 118, where an agreement for a lease entered into by directors was enforced against them individually.

[1] An agreement in form, in the singular number, signed in the name of a firm is joint and not joint, and several or several. Brown *v.* Fitch, 33 N. J. L. 418.

A contract drawn by one partner, and signed by the other in the partnership name, is the agreement of both as partners. Witter *v.* M'Neil, 4 Ill. 433.

An agreement signed by one of three co-partners, who together furnished the funds for the business to a fourth partner, who was managing agent, contracting to pay him $500 per annum and his traveling expenses, *held* not an individual but a partnership contract. Hills *v.* Bailey, 27 Vt. 548.

(*r*) *Infra*, note (*x*) *et seq.*

(*s*) Lloyd *v.* Ashby, 2 C. & P. 138; Ducarry *v.* Gill, 4 ib. 121; Eastwood *v.* Bain, 3 H. & N. 738.

(*t*) Bottomley *v.* Nuttall, 5 C. B. N. S. 122; Miles' claim, 9 Ch. 635. As to the difference between an acceptance in the form A. for B., and B. *per proc.* A., see O'Reilly *v.* Richardson, 17 Ir. Com. Law Rep. 74:

[2] Where the proprietors of a line of canal boats, by articles between them-

Bills and notes payable to a person who is uncertain.

A contract entered into with the chairman of directors for the time being, or the directors for the time being, or the purser or treasurer or secretary for the time being, is, in point of law, a contract with *the* chairman, *the* directors, or *the* purser, treasurer, or secretary, *at the time the contract is entered into;* and, on the ground of want of certainty, bills of exchange and promissory notes made payable to the treasurer, &c., for the time being of a company, are invalid, as bills of exchange and promissory notes, and cannot be sued upon as such. (*u*)

*341 **First, as regards bills having the name of the firm upon them.*[1] A bill drawn, indorsed or accepted in the name of the firm is considered as bearing the names of *all* the persons who actually or ostensibly compose the firm at the time its name is put to the bill; and consequently all those persons, including as well dormant as *quasi*-partners, may be sued upon the bill. (*x*)

(*a*) Bills in name of firm.

selves, agreed that the business of the concern at Rochester should be conducted by J. A., one of the proprietors, in his own name, and that at Albany it should be conducted by W. M., an agent, but in behalf and upon the responsibility of the defendants, who were two of the proprietors; that no co-partnership name should be used, and no paper made, accepted or indorsed in the name or on account of the co-partnership; and that each party should raise his share of the money needed by the concern upon his own responsibility, and the other parties were not to be liable therefor, but all the parties were to share equally in the profits: *Held*, that a bill of exchange drawn by J. A. in his own name to raise money for the business of the concern upon, and accepted by W. M. in his name, and which was discounted by the plaintiffs, bound all the proprietors as acceptors: *Held*, further, that all the proprietors were chargeable as drawers; and that no notice of non-payment was necessary, the drawers and acceptors being the same persons. Bank of Rochester *v.* Monteath, 1 Den. 402.

(*u*) Yates *v.* Nash, 8 C. B. N. S. 581; Storm *v.* Sterling, 3 E. & B. 832, and Cowie *v.* Sterling, 6 E. & B. 333.

[1] A note made by one partner, in which he says, "I promise to pay," etc., but subscribes the partnership name, "A B & Co.," is binding on the firm, and not on the partner alone who executed it. Doty *v.* Bates, 11 Johns. 544.

Where the articles of co-partnership do not fix the name of the firm, and a contract is made by one partner for the joint account, a note executed by one for the whole, in the name of himself and company, is binding upon all. Aspinwall *v.* Williams, 2 Hill (S. C.), 64.

A party can only be bound on a note executed in a firm name, who is actually a member of the firm executing the same, or who has held himself out as a member, so as to give the firm credit on his responsibility. Sargent *v.* Collins, 3 Nev. 260.

(*x*) See, as to dormant partners, Swan *v.* Steele, 7 East, 210; Wintle *v.* Crowther, 1 Cr. & J. 316; and as to *quasi*-partners, Gurney *v.* Evans, 3 H. & N. 122. A clerk who affixes the name of the firm is not liable on the bill.

Thus, where A. employed B. to carry on his business, and such business was carried on by B. for A. under the name of B. & Co., a bill accepted by B. in the name of B. & Co., for the purposes of the business, was held to be the acceptance of A.; although B. had positive instructions not to accept bills, and the holder of the bill, who was an indorsee for value, knew nothing of A. or B. or of the business. (*y*) Edmunds v. Bushell.

Moreover, if two partners, A. & B., carry on business in the name of A., a bill accepted by B. in the name of A. for the purposes of the partnership will bind both partners, although addressed to A. at a place where he carries on a separate business. (*z*) Stephens v. Reynolds.

If there are two firms with one name, a person who is member of both firms is liable to be sued on all bills bearing that name, and binding on either firm. But if a member of only one of the two firms is sued on the bill, his liability will depend first, on the authority of the person giving the bill to use the name of the firm of which the defendant is a member; and, secondly, on whether the name of that firm has in fact been used. If both these questions are answered in the affirmative, he will be liable, but not otherwise.[a] Two firms with one name.

Wilson *v.* Barthrop, 2 M. & W. 863.

(*y*) Edmunds *v.* Bushell, L. R. 1 Q. B. 97.

(*z*) Stephens *v.* Reynolds, 5 H. & N. 513, and at Nisi Prius, 1 Fos. & Fin. 739, and 2 ib. 147. N. B.—The bill was drawn on Reynolds at Woolwich, not at Walworth, as stated in 1 Fos. & Fin. 740.

[a] Where the plaintiff delivered property to W. Downer and H. Dana, and executed to them by the name of Downer and Dana, a bill of sale of the property, in which he acknowledged receipt of payment by note, and the note which he received was, by Dana, signed "Downer & Dana," and it appeared in evidence that there was in existence at that time, doing business, such a firm as "Downer & Dana," consisting of those two individuals, it was *held*, that the plaintiff could not recover on the note against another firm of different style, consisting of the same Downer and Dana and a third person, notwithstanding it might appear that the latter firm was also then doing business at the same place, there being no testimony tending even to prove that the latter firm had, at any time, done any act which could have induced the plaintiff to believe that Downer and Dana had ever been authorized to use their own name and style for the purposes of the other firm; and that upon the testimony it was improperly left to the jury to find whether the note was executed, and received by the plaintiff as the note of the latter firm. Miner *v.* Downer, 19 Vt. 14.

A partnership is not bound by the acts of another partnership having a common member, unless it authorizes

Swan v. Steele.

Thus in Swan *v.* Steele (*a*) there were two firms of Wood & Payne, one a cotton firm, the other a grocer's firm. The defendant Steele was a partner in the cotton firm only. A *bill was paid to the cotton firm for a debt due to it, and was made payable to its order. This bill was indorsed in the name of "Wood & Payne" by Steele's co-partners, for a debt owing to the plaintiff by the grocer's firm, to which Steele did not belong. Steele was nevertheless held liable on this bill, the plaintiff being a *bonâ fide* holder for value, without notice that any fraud on Steele was being committed. In this case the bill was properly indorsed by "Wood & Payne," and the only question was who constituted that firm. The bill could only have been endorsed by the cotton firm. Steele was a member of *it*, though he was not a member of the firm for whose debt his partners paid it away. Lord Ellenborough held Steele's liability to be too clear for argument: for Steele was a member of the indorsing firm, and his co-partners in that firm were guilty of a fraud on him, of which the plaintiff's had no notice.

*342

Name of firm same as that of individual.

Again, persons may carry on business in partnership in the name of one of themselves, and if they do, they will be liable on bills accepted by him in that name, if it was in fact used to denote all the partners (*b*); but not otherwise.[1]

and sanctions those acts. Cobb *v.* Illinois Central R. R. Co. 38 Iowa, 601.

Two firms of the same name did business in the same town. Defendant, who was a partner in one firm but not in the other, was sued as a member of the firm to which he did not belong, for the value of goods which had not been purchased by him individually nor by his authority: *Held*, that he could only be held liable as a partner in the firm to which he did not belong, where the two firms conducted their business in such a manner as to justify the conclusion by their customers that there was an identity of interest. Cushing *v.* Smith, 43 Tex. 261.

A merchant who sells goods to one, knowing him to be a member of two different firms, for either of which the goods sold would be suitable, should ascertain by inquiry, with which firm he is dealing, and if he fails to make such inquiry, he cannot hold the firm for which the goods were not purchased, responsible. Cushing *v.* Smith, *supra*.

(*a*) 7 East, 210.

(*b*) South Carolina Bank *v.* Case, 8 B. & C. 427; *Ex parte* Law, 3 Deac. 541.

[1] Where a partnership is carried on in the name of an individual, and a suit is brought against the partners on a note or other obligation signed by such individual, the legal presumption is, that it is the note of the individual and not of the partners. The plaintiff, to recover against the partners, must not only prove the execution of the note, but go further, and prove either that the money for which the note was given was borrowed on the credit of the partnership, or that, when obtained, it was used in the business of the partnership.

If A., B. & C. are partners, and A. draws a bill of exchange on B., and he accepts the bill, A., B. & C. cannot be sued upon it; and this is so whether A. B. & C. have a business name or not (*c*); and even although the bill may have been used for the joint benefit of the three partners. (*d*) Even if it is agreed that the business of the three shall be carried on in the name of one of them, it will not follow that all bills accepted by him will bind all the three partners: it will not do so if the real agreement between the partners was that he should draw or accept in his own individual character only, and if the others have not held themselves out as carrying on business in his name.

This was decided by the Court of Appeal in Chancery in Miles' claim. (*e*) There four firms, F. & Co., M. & Co., M. & L., and A. & Co., engaged in a joint adventure, *and agreed to carry on business under the name of F. & Co., and to divide profits and losses in equal shares. They also agreed that funds for the adventure should be raised by the drafts of any one of the four firms on the others: bills were drawn by M. & Co. on A. & Co., on M. & L., and on F. & Co., and were duly accepted. It was held that none of these bills bound all four firms jointly. As regards the bills drawn on A. & Co., and on M. & L., the case presented no difficulty, for it is plain that these bills were not drawn or accepted in the name in which the joint adventure was carried on. As regards the bills accepted by F. & Co., which was the name under which the joint adventure was carried on, there was an ambiguity; but the court held that this name, *343

Miles' claim.

Oliphant *v.* Mathews, 16 Barb. 608; Mercantile Bank *v.* Cox, 38 Me. 500; Chemung Bank *v.* Ingraham, 58 Barb. 290. See, also, U. S. Bank *v.* Binney, 5 Mason, 176.

On the formation of a partnership between S. & I. under the firm name of "J. S.," a note was made by J. S. in his own name, which he procured to be discounted by the plaintiff for the purpose of enabling him to pay in his share of the capital. S. did not represent to the plaintiff that it was a firm note, and the payees as officers of the plaintiff's bank, knew, or had good reason to believe, that the note was not the note of the firm, but was the individual note of S.: *Held*, that I. was not liable as a party to the note in any form; and no recovery could be had against him by the plaintiff as holder thereof; that if the lender did not know of the partnership, or if the money was loaned on the individual credit of the maker of the note, the fact that the money was applied to the business of the firm did not create a liability on the part of the firm, or constitute the lender a creditor of the firm. Chemung Bank *v.* Ingraham, 58 Barb. 290.

(*c*) See Nicholson *v.* Ricketts, 2 E. & E. 497, and Miles' claim, 9 Ch. 635.

(*d*) *Ibid.*

(*e*) 9 Ch. 635.

used as it was, really meant the separate firm, F. & Co., and not the four firms engaged in the adventure, and that there was no sufficient reason for holding it to mean anything else.

Hall v. West.

Again, in Hall *v.* West, (*f*) three brothers of the name of Dawson carried on in partnership under the name of Dawson & Sons, the business of millers, farmers, coal and corn dealers, and bone crushers. The defendant was a dormant partner in the bone crushing business only. Dawson & Sons overdrew their account with their bankers, who knew nothing of West, nor of his connection with the bone business. Having, however, discovered this, they sued him for the amount of the overdrawn account. He was held not liable; for in point of fact the balance due to the bankers was not in respect of any debt contracted by Dawson & Sons in connection with the bone crushing business; it was not, therefore, as between the partners themselves a debt of the firm of which the defendant was a member; and there was no apparent as distinguished from real authority on which the bankers could rely as against West.

In the same case bills were drawn by West on and accepted by Dawson & Sons. With one exception these bills were drawn for purposes unconnected with the bone business. On *344 *the facts stated (but which it is unnecessary here to detail) the court held that all these bills had in fact been paid: it became unnecessary, therefore, to consider whether West could have been sued as an acceptor. It was contended, on the authority of Baker *v.* Charlton (*g*), that he was liable; but the Court of Exchequer (*h*) dissented from that case and expressed a clear opinion that West could not have been liable as an acceptor of the bills, with the exception of the one which had been given for the pur-

(*f*) A special case decided in the Exchequer, and afterwards in the Exchequer Chamber in June, 1875. The above note of the case is taken from short-hand-writer's notes of the judgments.

(*g*) In Baker *v.* Charlton, Peake 80, two firms carried on business under the name of J. King & Co. The defendant was partner in one of them only, but his co-partners were members of both firms; the defendant was sued by an indorsee on a bill drawn by his co-partners in the name of "J. King & Co;" the defendant resisted the action on the ground that the bill was not drawn by the firm to which he belonged, but by the other; but Lord Kenyon declared the defense invalid. Having traded with persons under the style of "J. King & Co.," the defendant was liable on bills drawn by them in that name. See, also, Davidson *v.* Robertson, 3 Dow. 218; McNair *v.* Fleming, 1 Mont. Part. 37, and 3 Dow. 229. But Baker *v.* Charlton cannot now be relied on.

(*h*) *i. e.* Kelly C. B. and Amphlett, B.

poses of the bone business in which he was a partner. The Court of Exchequer Chamber expressed no opinion on this point, it being unnecessary to do so.

Secondly, as regards bills not drawn, accepted or indorsed by the firm in proper form. In the absence of evidence to the contrary, a partner has no authority to use for partnership purposes any other name than the name of the firm (*k*); and if he does, and there is any substantial variation which cannot be shown to be authorized by his co-partners, the firm will not be liable. If, however, there is no substantial variation, the firm will be bound.[1]

(b) Bills not in name of firm.

(*k*) Kirk *v.* Blurton, 9 M. & W. 284; Hambro' *v.* Hull and London Fire Insur. Co., 3 H. & N. 789.

[1] Where the partners of a firm have a co-partnership name which they ordinarily use, they will not be bound by the use of a new name, unless it be shown that all the partners have assented to the use of such new name, or that the partner who was intrusted with the control and management of the business of the firm had so assented. Palmer *v.* Stephens, 1 Den. 471.

A member of the firm of "Charles G. Ramsay & Co." signed a promissory note "Chas. G. Ramsay & Co.:" *Held*, in a suit upon the note against the firm, that it was a question of fact whether there was any substantial difference between the signature and the firm name, and that the jury were well warranted in finding that the name and signature were the same. Tilford *v.* Ramsey, 37 Mo. 563.

A, B, C, and D were partners, under the style of A, B & Co. C executed a note signing the names of each of the firm. *Held*, on a plea of *non est factum*, filed by A, B and D, that C had no power to bind them by such signature; but that it constituted the note *primâ facie* an individual transaction. Crouch *v.* Bowman, 3 Humph. 209.

However, in McGregor *v.* Cleveland, 5 Wend. 475, it was *held* that a promissory note given by one of two partners in the business of farming and coopering, signed "A B & C D," was binding upon both.

Where the priority of different creditors attaching the property of a firm is to be determined by the individual or partnership character of their respective claims, the mere fact that a promissory note is signed by the individuals who compose the firm, is insufficient to show that it is a partnership debt. Gay *v.* Johnson, 45 N. H. 587.

A note, however, signed by three partners individually, rather than by their partnership name, for money used in their partnership business, on account of the preference of the payee, is a partnership note. Kendrick *v.* Tarbell, 27 Vt. 512.

Where two firms in different localities enter into an agreement, in express terms, creating a partnership for the purpose of carrying on the legitimate freighting business, and, adopting no partnership name, carry on the business in each locality under the name of the firm there established, a bill of exchange drawn by one firm upon the other, the proceeds of which are applied to the partnership business, will bind the firm against which it is drawn, not only in an action for money lent, but also as a party to the bill. Wright *v.* Hooker, 10 N. Y. 51.

See *ante*, 211.

In Faith *v.* Richmond (*l*), persons carrying on business in partnership under the name of *The Newcastle and Sunderland Wallsend Coal Company*, were held not liable on a note issued in the name of *The Newcastle Coal Company;* and in Kirk *v.* Blurton (*m*), where two persons carried on business under the name of *John Blurton*, one of *345 them was held not liable on a *bill drawn and indorsed by the other in the name of *John Blurton & Co.*

Faith *v.* Richmond.

Kirk *v.* Blurton.

On the other hand, in Norton *v.* Seymour (*n*), where the name of the firm was Seymour & Ayres, a promissory note signed by one of the partners thus—"Thomas Seymour & Sarah Ayres," was held to bind both.

Norton *v.* Seymour.

In the above cases of Faith *v.* Richmond, and Kirk *v.* Blurton, the name used was not the name of the firm sought to be made liable, nor was there any evidence to show that the firm was in the habit of making use of the name in question. If there had been such evidence the firm would have been liable; for whatever the name used may be, if it is that ordinarily employed by a partner whose business it is to attend to the bills and notes of the firm, the other partners will not be heard to say that such name is not the name of a firm for the purpose for which he has habitually used it.

Effect of frequent use of wrong name.

Therefore, where the name of a firm was Hapgood & Co., but the managing partner was in the habit of indorsing bills of the firm in the name of Hapgood & Fowler, which had formerly been the name of the firm, it was held that such indorsement was valid, although the other partners were not shown to have authorized the use of the name in question. (*o*)

Williamson *v.* Johnson.

Again, although in Faith *v.* Richmond and Kirk *v.* Blurton, the firm was held not bound, in consequence of the name of the firm not being used, those members of the firm who actually made use of the names in question were held liable; for the name used was made theirs by their own act. (*p*)

Liability of persons using the wrong name.

(*l*) 11 A. & E. 339.

(*m*) 9 M. & W. 284. This case was decided on the right principle; but most persons will probably agree with Martin, B., in thinking that the principle was not properly applied, and that it should have been left to the jury to say whether *John Blurton* and *John Blurton & Co.* did not in fact mean the same thing. See *per* Martin, B., 5 H. & N. 517.

(*n*) 3 C. B. 792.

(*o*) Williamson *v.* Johnson, 1 B. & C. 146.

(*p*) So in Wild *v.* Keep, 6 C. & P. 235, a person of the name of Joseph

Upon the same principle, if blank bills are drawn and indorsed by a firm, and before they are negotiated one partner dies and the name of the firm is changed by the surviving partners, and the bills previously drawn and indorsed are then negotiated; *these bills will be binding on the new firm, although the *346 name on the bills is that of the old firm and not that of the new. (*q*)

A bill drawn on a firm by a wrong name and accepted in its right name, binds the firm (*r*); and a bill drawn on a firm and accepted by one partner in his own name only, has been held to bind the firm on the ground that the word "accepted," if written by one of the partners, is sufficient without any signature; and that his signature, if affixed, may be treated as redundant. (*s*)[1] But there is no other case in which a firm is liable

Cases in which error in name is unimportant.

Keep was held liable on a bill accepted by himself in the name of John Keep & Co.

(*q*) Usher *v.* Dauncey, 4 Camp. 97. If a change is made in a firm, and by a mistake a contract is entered into with it in its old name, the members of the new firm may sue on it, provided the other party is not prejudiced by their so doing, Mitchell *v.* Lapage, Holt, N. P. Ca. 253. But see Boulton *v.* Jones, 2 H. & N. 564.

(*r*) Lloyd *v.* Ashby, 2 B. & Ad. 23.

(*s*) Mason *v.* Rumsey, 1 Camp. 384. Jenkins *v.* Morris, 16 M. & W. 879; Byles on Bills, 43 and 45, ed. 11. In such a case the acceptor may also be sued alone. See *infra*.

[1] Beach *v.* State Bank, 2 Ind. 488; Pannell *v.* Phillips, 55 Geo. 618; Tolman *v.* Hanrohen, 44 Wis. 133. *Contra*, Heenan *v.* Nash, 8 Minn. 407.

The act of drawing a bill by one partner, in his own name, on the firm of which he is a member, for the use of the partnership, is in law an acceptance by the drawer in behalf of the firm; and an action may be maintained against the firm as on an accepted bill. Dougal *v.* Cowles, 5 Day, 511.

If a partner, acting under the authority of the firm, given by parol, to take up money on joint account, and draw therefor on A, does draw a bill of exchange in his own name, but directs the amount to be charged to account of the firm, and the parties, knowing the facts, receive the cargo, purchased with the funds so raised, without objection, the payee may recover of the partners as on a partnership draft, or a draft guaranteed to the holder by them. Reimsdyk *v.* Kane, 1 Gall. 630.

A firm did business in Richmond under the name of D. M. & Co., all the members residing there except A, who was in London, where he carried on business in his own name. B drew a bill of exchange on A in London, "on account of D. M. & Co.," which was accepted by A: *Held*, in a suit by B, the drawer, that this was the individual acceptance of A, who alone was liable thereon, though the firm of D. M. & Co. might be liable for the amount of the bill, on proof that the bill was drawn on account of money contracted to be paid by D. M. & Co. Cunningham *v.* Smithson, 12 Leigh, 32.

A draft drawn by one only of three partners, but on their joint credit, and for their joint benefit, may be recovered

on a negotiable instrument, made, drawn, or indorsed in the name of one of the partners only (*t*), unless, indeed, his name is the name of the firm. (*u*) Even a bill drawn on one partner and accepted by him on behalf of the firm does not bind the firm, the other partners not being drawees (*x*)[2]; and on the same principle a bill drawn on the directors of a company, and accepted for the company by its manager and three of its directors, binds the three directors who accept the bill, but no one else. (*y*) *A fortiori*, a bill drawn on the agent of a company, and accepted by him simply in his own name, binds him and not the company. (*z*) On the other hand, a bill drawn on a company and accepted by its directors, secretary, or other authorized agent on its behalf or as its agent, binds the company and not those who accept the bill, except so far as they are members of the company. (*a*)

Drawee and acceptor not identical.

But to this last rule there is an exception where the company *347 is a limited company, and *the word "limited" is omitted, for then the agent accepting the bill is personally liable. (*b*)

Examples of foregoing rules.

The following examples illustrate these propositions:

Thomas *v.* Bishop.

In Thomas *v.* Bishop (*c*), the bill was drawn on John Bishop, cashier of the York Buildings Company, and was accepted by Bishop in his own name, without reference to the company, and he was held by Lord Hardwicke to be personally liable on the bill.

Serrell *v.* The Derbyshire, &c., Railway Company.

In Serrell *v.* The Derbyshire, Staffordshire, &c., Railway Company (*d*), a cheque was drawn on the bankers of a company, and was signed by three directors, and countersigned by the secretary, and on the cheque was a date stamp, with the name of the company in a circle round the

as an item in an account against the firm. Beebe *v.* Rogers, 3 Iowa, 319.

(*t*) Emly *v.* Lye, 15 East, 7; *Ex parte* Bolitho, Buck. 100; Lloyd *v.* Ashby, 2 C. & P. 133; Williams *v.* Thomas, 6 Esq. 18.

(*u*) As to which see *ante*, pp. 341, 342.

(*x*) Nicholls *v.* Diamond, 9 Ex. 154; Mare *v.* Charles, 5 E. & B. 978.

[2] One of the members of a partnership carrying on business in Virginia, resided in London, but no house was established in London. The plaintiff drew a bill on the member of the firm residing in London, expressed to be "on account of" the partnership. The bill was accepted by the drawee in his own name: *Held*, that the partnership was not liable on the acceptance. Cunningham *v.* Smithson, 12 Leigh, 32.

(*y*) Bult *v.* Morell, 12 A. & E. 745.

(*z*) Ducarrey *v.* Gill, 1 Moo. & M. 450, and 4 C. & P. 121; Thomas *v.* Bishop, 7 Mod. 180.

(*a*) See Edwards *v.* Cameron's Coalbrook Co., 6 Ex. 269; Halford *v.* Cameron's Coalbrook Co., 16 Q. B., 442, and Eastwood *v.* Bain, 3 H. & N. 738.

(*b*) See the Companies act, 1862, § 42, and Penrose *v.* Martyr, E. B. & E. 499.

(*c*) 7 Mod. 180.

(*d*) 9 C. B. 811.

date; but the company was held not liable upon the cheque, for it did not purport to be a cheque of the company. The persons who signed the cheque had not even signed it as directors.

In Bult *v.* Morell (*e*), the bill was drawn on the Directors of the Imperial Salt and Alkali Company, and was accepted for the Imperial Salt and Alkali Company, and signed Bult v. Morell.

Richard Parker, Manager,
J. Rainsford,
James Parker,
Richard Garrett, } Directors.

The three last named persons only were held liable on the bill.

In Nicholls *v.* Diamond (*f*), the bill was drawn on "Mr. James Diamond, purser, West Downs Mining Company," and was accepted thus, "James Diamond, accepted *per proc.* West Downs Mining Company." Diamond was held liable on this bill. Nicholls v. Diamond.

In Mare *v.* Charles (*g*), a bill was drawn on Wm. Charles for goods supplied to a mine, and was "accepted for the company, Wm. Charles," and this acceptance was held to render Charles solely liable. Mare v. Charles.

If a bill is drawn on the firm and is accepted by one partner, although this binds the firm, (*h*) it also binds the partner accepting the bill, who may alone be sued on it. This was held in Owen *v.* Van Uster, (*i*) where a bill was drawn on "The Allty-Crib Mining Company," and was accepted "*per proc.* The Allty-Crib Mining Company, W. T. Van Uster, *London Manager." It was held that Van Uster was personally liable on this bill, he being one of the company on which the bill was drawn, and therefore one of the drawees, and also an acceptor. Owen v. Van Uster. *348

Thirdly, as regards promissory notes.[1] With respect to promissory notes the following rules are deducible from the cases:— (c) Promissory notes.

(*e*) 12 A. E. & E. 745.

(*f*) 9 Ex. 154.

(*g*) 5 E. & B. 978.

(*h*) See *ante*, p. 346, note. (*s*)

(*i*) 10 C. B. 318. The company in this case was a mere partnership.

[1] See, generally, Ewell's Evans on Agency, *177, 186, *et seq.*, and notes.

Generally, when a member of a firm makes a note, or draws a bill in his own name though it is known to be on the partnership account, the firm will not be bound. *Re* Warren, Davies, 320; Farmers' Bank *v.* Bayless, 35 Mo. 428; Foster *v.* Hall, 4 Humph. 346.

A note, given in the individual name of one partner, is *primâ facie* deemed his individual obligation, unless his partner be a dormant partner. Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Graeff *v.* Hitchman, 5 Watts, 454.

The taking, not as payment, of the individual note of one partner for money loaned, though it may be evidence that the loan was not made to the firm, is not conclusive of that fact. Where

1. If a partner promises for himself, and not for himself and co-partners, he only is liable on the note, though he may promise to pay a partnership debt. (*k*)

Promise by one partner.

such individual note of one partner is taken for a loan made at the time to the firm, the presumption is that it was not taken as payment. Hoeflinger *v.* Wells, 47 Wis. 628.

It has been held that to bind a partner by a note drawn by his co-partner in his own individual name, it must appear that such individual name was the style of the firm. Macklin *v.* Crotcher, 6 Bush, 401.

The signature of one partner to negotiable paper, however, binds all, though he signs only his own name, if, from the paper itself, it appears to be on partnership account, and to be intended to have a joint operation. Crozier *v.* Kirker, 4 Tex. 252.

Where only one member of a firm signs his individual name to a note, the firm will be bound thereby if they, as partners, made the contract, and the credit was given to them as such. Puckett *v.* Stokes, 58 Tenn. 442.

In order to make a note, signed in the individual name of one of the partners, binding upon the firm, it must be made to appear, affirmatively, that it was given and received as a firm note, binding upon all the partners. Hubbell *v.* Woolf, 15 Ind. 204; Buckner *v.* Lee, 8 Ga. 285; Staats *v.* Howlett, 4 Den. 559.

When a partnership is sued upon a promissory note, signed by one partner only in his individual name, which was not the firm style, the burden of proof is on the plaintiff to show that the note was, in fact, a partnership transaction; and the partnership will not be made liable by proof that the money was borrowed for the use of the firm, and was so used by them, and that the parties to the note were aware of those facts, if it also appears that the money was advanced on the personal credit of the individual partner, and the parties knew that the note was to be negotiated as the individual note of the maker. Farmers' Bank *v.* Bayliss, 41 Mo. 275.

Where one partner keeps the bank account of the firm in his own name, with the knowledge and consent of the others, all partnership debts and accounts being paid by checks drawn and signed by him alone, the firm is liable upon such a check drawn in its business. Crocker *v.* Colwell, 46 N. Y. 212.

Where a firm, consisting of three members, is engaged in business as a private bank, and has been so engaged for about a year, with M., one of the partners, as resident and managing partner, and F., who has been in the habit of dealing with the bank, goes into its ordinary place of business, and intending to deal with it, hands over the counter, to such managing partner, fifty dollars, in the usual manner for deposit, and receives therefor, upon a printed blank in the name of the bank, a certificate of deposit signed by M., and nothing is said about any personal loan to M., and no intimation given of any other than, as F. intended, a transaction with the bank, and F. has no knowledge of any agreement between the partners as to the form of the firm's blanks or the manner of the firm's signature: *Held*, that such certificate is binding upon the firm, and that, notwithstanding that M. did not affix to his signature to the certificate any such words as "cashier" or "managing partner," and although M. intended to

(*k*) Siffkin *v.* Walker, 2 Camp. 308; Murray *v.* Somerville, 2 Camp. 99, note; and see *Ex parte* Harris, 1 Madd. 583.

2. If several partners sign a note in this form, "I promise to pay," all who sign the note are liable on it, jointly and severally. (*l*) Promise by several partners.

3. If one partner promises in the name of the firm to pay that for which he and not the firm is liable, the promise binds him, at all events. As an illustration of this, reference may be made to Shipton *v.* Thornton. (*m*) Promise by one in name of firm. Shipton *v.* Thornton.

take it as a loan to himself and did not enter the transaction in the books of the firm, nor pass over to its credit the money, but appropriated the same to his own use, and although the blank form used for the certificate was not the one generally used by the bank after the formation of the partnership, but that used by M. while carrying on by himself the business of banking prior thereto in the same place and under the same name. Lemon *v.* Fox, 21 Kan. 152.

C, one of the partners of the firm of A, B and C, executed the following note: "Dec. 7, 1835. One day after date, due J. Sithens 267 dollars and 87 cents, for work done on West River bridge for the company of A, B and C. By me, C": *Held*, that this note bound the firm. Caldwell *v.* Sithens, 5 Blackf. 99.

Where two persons, by virtue of an agreement, become partners as to third persons, without any firm name, and one of the parties who transacted the business gave a note, signed in his own individual name, for goods purchased, and the payee was ignorant of the relations of the parties: *Held*, that the dormant partner was not liable on the note. Palmer *v.* Elliott, 1 Cliff. 63.

Under the law of Virginia, an action may be maintained upon a promissory note against a secret partner who did not sign it; but he is not liable unless the money came to the use of the firm. Bank of Alexandria *v.* Mandeville, 1 Cranch, C. Ct. 575.

A member of a firm, which was well known, purchased a horse, for which he gave his individual note: *Held*, that the partnership was not liable, although the avails of the horse, when sold, went into the partnership fund. Holmes *v.* Burton, 9 Vt. 252.

A note given to one partner may be evidence of a settlement with his firm, he being in the habit of taking in his own name notes due the firm. Boffandick *v.* Raleigh, 11 Ind. 136.

A declaration which states that the defendants, A and B, formed a co-partnership, and agreed between themselves that A should buy certain goods for the firm, and execute his own note in payment, on which they should be jointly liable, whereupon A bought the goods; that, in consideration of the acceptance of A's note in payment, and the delivery of the goods to the firm, the defendants promised to pay the amount of the note when it fell due, shows a good consideration for the promise of B, and that it was an original undertaking, and not a promise to pay the debt of another. Hotchkiss *v.* Ladd, 36 Vt. 593.

Where merchandise was delivered by partners, in payment of a note signed by one of the partners, but given for a partnership transaction: *Held*, that the vendors could not recover the value of the merchandise of the vendees, on the ground that it was not a note of the partnership. Owings *v.* Trotter, 1 Bibb, 157.

(*l*) Clarke *v.* Blackstock, Holt, N. P. C. 474; March *v.* Ward, 1 Peake, 177 (ed. 3).

(*m*) 9 A. & E. 314. See, too, Hudson *v.* Robinson, 4 M. & S. 475.

There the defendant, a partner in the house of Thornton and West, was solely liable to the plaintiff for certain freight, and he gave the plaintiff a note in this form:

I HEREBY engage to pay the amount of freight, &c.,
am, &c.,
R. & R. THORNTON & WEST.

On this note the defendant was held separately liable.

4. One partner has no authority, as such, to bind himself and co-partners jointly and severally. (*n*) But if some members of a firm make a joint and *several* promissory note they will be personally liable, although they may have signed only on behalf of themselves and co-partners; and persons signing notes in the following forms have been held liable on them as *makers, and not merely incidentally as members of the company to which they belonged.[1]

Joint and several notes.

*349

Healey *v.* Story. WE jointly and severally promise to pay, &c., value received for and on behalf of the Wesleyan Newspaper Association.

PARKER STORY,
JAMES WARE, } Directors. (*o*)

Penkivel *v.* Connell. WE, the directors of the Royal Bank of Australia, for ourselves and other shareholders of this company, jointly and severally promise to pay, &c., value received on account of the company.

T. W. SUTHERLAND,
J. CONNELL,
M. BOYD,
A. DUFF, } Directors. (*p*)

Bottomley *v.* Fisher. *Midland Counties Building Society.*

WE, jointly and severally promise to pay, &c.

W. R. HEATH,
S. B. SMITH, } Directors.
W. D. FISHER, Secretary. (*q*)

(*n*) Maclae *v.* Sutherland, 3 E. & B. 1, which shows that a joint and several promissory note is valid as a joint note, though it is not binding, as a several note, or any person who does not sign it.

[1] See the cases collected in Ewell's Evans on agency, 177, 186 *et seq.*

(*o*) Healey *v.* Story, 3 Ex. 3, in which Story and Ware were sued jointly.

(*p*) Penkivil *v.* Connell, 5 Ex. 381, in which Connell only was sued.

(*q*) Bottomley *v* Fisher, 1 H. & C.211; in which Fisher only was sued.

5. If a partner promises for himself and co-partner, this amounts to a promise by the firm. (*r*) Accordingly the firm has been held liable on notes in the following form:— Promise for self and co-partners.

SIXTY days after sight I pay A. or order £200, value received. Galway *v.* Matthew.
For J. MATTHEW,
T. WHITSMITH,
T. SMITHSON,
J. MATTHEW; (*s*)

and, contrary to an older decision (*t*), the firm has been held liable on notes in the form following:—

Leicester and Leicestershire Bank. *350
I PROMISE to pay the bearer on demand £5, value received, *Ex parte* Buckley.
For JOHN CLARKE,
RICHARD MITCHELL,
JOSEPH PHILLIPS,
THOMAS SMITH,
RICHARD MITCHELL. (*u*)

6. If directors or others themselves promise to pay, they are personally liable, and the company is not; but if the true construction of the instrument is that the promise is that of the company, then the company, and not the agents signing the note, will be liable. The cases on this subject are not all easily reconcilable, as the following notes of them will show. Notes of directors and companies.

In Price *v.* Taylor (*x*), the trustees and secretary of a building society signed, and were held personally liable upon, a promissory note in the following form:— Promissory notes. Price *v.* Taylor

Midland Counties Building Society.
Two months after demand in writing we promise to pay Mr. Thomas Price £100, for value received.
W. R. HEATH, JOHN TAYLOR, } Trustees.
W. D. FISHER, Secretary.

(*r*) Smith *v.* Bailey, 11 Mod. 401; Lane *v.* Williams, 2 Vern. 277 and 292; Smith *v.* Jarves, 2 Lord Raymond, 1484.

(*s*) Galway *v.* Matthew, 1 Camp. 403.

(*t*) Hall *v.* Smith, 1 B. & C. 407, where the form was "I promise to pay—— for A B, C D and E F, signed A B," and which was held to bind A B separately

(*u*) *Ex parte* Buckley, 14 M. & W. 469, and 1 Ph. 562; and *Ex parte* Clarke, DeGex, 153, reversing *Ex parte* Christie, 3 M. D. & D. 736.

(*x*) 5 H. & N. 540. Compare Lindus *v.* Melrose, *infra*, p. 351.

In Miller *v.* Thompson (*y*), the following instrument, drawn on a joint-stock bank, by the manager of one of its branches, was held to be the promissory note of the directors of the bank, and to be binding on them personally;

Miller *v.* Thompson.

London Trades' Joint Stock Banking Company.
Dorking Surrey, 24th August, 1839.

SIX months after date, pay, without acceptance, to the order of John Cogan Francis, Esquire, £100, value received.

(*Signed*) For the Directors,
THOMAS NEWHAM, Manager.

(*Addressed*) The London Trades' Joint Stock Banking Company, 33 Gracechurch Street, London.

Notes of companies.

*351 *On the other hand, companies have been held bound by notes in the following forms:—

Aggs *v.* Nicholson.

WE, two of the directors of the Ark Life Assurance Society by and on behalf of the Society, do hereby promise to pay, &c., value received.

(Signed by two directors, and sealed with the seal of the Company.) (*z*)

Maclae *v.* Sutherland.

WE, directors of the Royal Bank of Australia, for ourselves and other shareholders of the Company, jointly and severally promise to pay, &c., for value received, on account of the Company.

J. W. SUTHERLAND, Chairman.
ADAM DUFF,
JOHN MITCHELL, } Directors. (*a*)

Entered, BENJAMIN WOOD, Secretary.

Lindus *v.* Melrose.

WE jointly promise to pay, &c., for value received in stock, on account of the London and Birmingham Iron and Hardware Company, Limited.

JAMES MELROSE,
G. N. WOOD,
JOHN HARRIS, } Directors. (*b*)

EDWIN GUESS, Secretary.

(*y*) 3 Man. & Gr. 576.

(*z*) Aggs *v.* Nicholson, 1 H. & N. 165.

(*a*) Maclae *v.* Sutherland, 3 E. & B. 1, held to be binding on the members of the company jointly.

(*b*) Lindus *v.* Melrose, 2 H. & N. 293, and 3 ib. 177, held to bind the company and not the directors signing. Compare Price *v.* Taylor, 5 H. & N. 540, *ante*, 364.

The following instruments have also been held to be promissory notes binding on companies:—

Sea, Fire, and Life Assurance Society.

To the CASHIER,

CREDIT A., or order, with the sum of, &c., on account of this Corporation. Allen v. Sea, Fire, &c., Company.

A. DAVIS,
W. OGILVIE, } Directors. (c)

Entered, F. F. A., Accountant.

*UNION BANK POST BILL. *352

AT sixty days after sight of this, our first bill of exchange (second and third of same tenor and date not paid), we promise to pay, on account of the proprietors of the Union Bank of Calcutta, &c., value received. Forbes v. Marshall.

J. RENNIE,
W. P. GRANT, } Directors. (d)

H. W. ABBOTT, Secretary.

2. *As regards incorporated companies*

Of the rule requiring contracts of corporations to be under seal.

It is a rule of the common law that, subject to one or two exceptions which will be noticed presently, a body corporate is not bound by any contract which is not under its corporate seal (e); and this rule has always been rigidly adhered to both at law and in equity. (f)[1] Even a resolution of the Contracts of corporations.

(c) Allen v. The Sea, Fire, and Life Assurance Co. 9 C. B. 574.

(d) Forbes v. Marshall, 11 Ex. 166. The above instrument had an acceptance written across it, and might, it seems, have been treated as a bill of exchange.

(e) Any seal affixed by the proper authority will suffice. See Grant on Corp. 59.

[1] See Ewell's Evans on Agency *18 *et seq.* and notes; Angell & Ames on Corp. § 237, where it is stated that, "in general throughout the United States it [the old rule of the English law] is entirely exploded."

(f) See generally, on this subject, Com. Dig. Franchise, F. 13; Bac. Ab. Corporation; Vin. Ab. Corporation; Grant on Corporations; R. v. Bigg, 3 P. W. 419; Broughton v. The Manchester and Salford Waterworks Co., 3 B. & A. 1; and on the application of the rule in equity as well as at law, see Winne r. Bampton, 3 Atk. 473; Taylor v. Dulwich Hospital, 1 P. W. 655; Wilmot v.

*353 members of *the body corporate is not equivalent to an instrument under its seal (*g*); and a corporation will not be compelled to execute a contract which it has been resolved shall be entered into by it. (*h*) A distinction was at one time supposed to exist between executed and executory contracts; but except where the equitable doctrines of part performance are applicable, a corporation is no more bound by a contract not under its seal, of which it has had the benefit, than it is by a similar contract which has not been acted upon by either party. (*i*)

Corporation of Coventry, 1 Y. & C. Ex. 518; Carter *v.* Dean of Ely, 7 Sim. 211; Gooday *v.* The Colchester Rail. Co. 17 Beav. 132; Preston *v.* The Liverpool, &c. Rail. Co. ib. 114, and 5 H. L. C. 605. An action will in some cases lie against a corporation for money had and received, Hall *v.* The Mayor of Swansea, 5 Q. B. 548; for money paid, Jefferys *v.* Gurr, 2 B. & Ad. 833; for use and occupation, Lowe *v.* The London and North-West Rail. Co. 18 Q. B. 632; and see Eccl. Comrs. *v.* Merral, L. R. 4 Ex. 162; but see Finlay *v.* The Bristol Rail. Co. 7 Ex. 409. As to actions by corporations on contracts not under seal, see South of Ireland Coll. Co. *v.* Waddle, L. R. 3 C. P. 463, and 4 ib. 617, overruling East London Waterworks Co. *v.* Bailey, 4 Bing. 283. See, also, McArdley *v.* Irish Iodine Co. 15 Ir. Com. Law. Rep. 146; Copper Miners' Co. *v.* Fox, 16 Q. B. 229; Fishmongers' Co. *v.* Robertson, 5 Man. & Gr. 131; Mayor of Stafford *v.* Till, 4 Bing. 75; Doe *v.* Tanniere, 12 Q. B. 998; The London Dock Co. *v.* Sinnott, 8 E. & B. 347; Doe *v.* Bold, 11 Q. B. 127. See as to the engagement of a clerk to a workhouse, Austin *v.* Guardians of Bethnal Green, L. R. 9 C. P. 91; and as to the appointment and retainer of a solicitor by an incorporated company, Thames Haven Dock Co. *v.* Hall, 5 Man. & Gr. 274; Faviell *v.* The Eastern Counties Rail. Co. 2 Ex. 344; R. *v.* Cumberland, 5 Ra. Ca. 332, which show that the solicitor on the record will be presumed to be properly appointed. If a solicitor sues a company for payment for his services, it is doubtful whether he must not prove a retainer under seal. See Arnold *v.* The Mayor of Poole, 4 Man. & Gr. 860, and compare Haigh *v.* North Brierly Union, E. B. & E. 873.

(*g*) Gibson *v.* The East India Company, 5 Bing. N. C. 262; Arnold *v.* The Mayor of Poole, 4 Man. & Gr. 860; Mayor of Ludlow *v.* Charlton, 6 M. & W. 815; Smart *v.* West Ham Union, 10 Ex. 867; R. *v.* The Mayor of Stamford, 6 Q. B. 443; Cope *v.* The Thames Haven Co., 3 Ex. 841; Dunstan *v.* The Imperial Gas Co. 3 B. & Ad. 125.

(*h*) Wilmot *v.* The Corporation of Coventry, 1 Y. & C. Ex. 518; Taylor *v.* Dulwich Hospital, 1 P. W. 655; Carter *v.* Dean of Ely, 7 Sim. 211.

(*i*) Mayor of Kidderminster *v.* Hardwick, L. R. 9 Ex. 13; Mayor of Ludlow *v.* Charlton, 6 M. & W. 815; R. *v.* Stamford, 6 Q. B. 443; Paine *v.* The Strand Union, 8 Q. B. 326; Lamprell *v.* The Billericay Union, 3 Ex. 283; Diggle *v.* The London and Blackwall Rail. Co. 5 Ex. 442; Homersham *v.* The Wolverhampton Waterworks Co. 6 Ex. 137; Arnold *v.* The Mayor of Poole, 4 Man. & Gr. 860; Cope *v.* The Thames Haven Co. 3 Ex. 841. Courts of equity did not interfere in these cases. See Crampton *v.* Varna Rail. Co. 7 Ch. 562; Kirk *v.* The Bromley Union, 2 Ph. 640; Ambrose *v.* The Dunmow Union, 9 Beav.

But strict as is the rule in question, it is and always has been subject to qualification. There are, it is said, some matters of so trivial a nature that they can be done so as to bind a corporation in the absence of any instrument under its seal (*k*); and what is more to the present purpose, it is held that if a corporation is created for carrying on a particular business, it will be bound by unsealed contracts entered into on its behalf in the ordinary course and *bonâ fide* for the *purposes of such business. (*l*) Upon this principle the East India Company was held liable to be sued upon bills of exchange accepted on its behalf, although its seal was not upon them. (*m*) So gas companies have been held bound by agreements, not under seal, for the supply of gas (*n*) and gas meters (*o*); a navigation company has been held bound by a contract, not under seal, for the navigation of its ships (*p*); a railway company has been held bound to pay for rails, oil, and paint, &c., supplied to it on the order of its officers (*q*); a colliery company for pumping machinery supplied for the purposes of its colliery (*r*); a poor law union for coals supplied on similar orders (*s*); and a municipal corporation owning a dock for refusing

Exceptions to the general rule.

*354

508; Jackson *v.* The North Wales Rail. Co. 13 Jur. 69; The Directors of the Midland Great West Rail. of Ireland *v.* Johnson, 6 H. L. C. 798. In Nicholson *v.* Bradfield Union, L. R. 1 Q. B. 620, a corporation was held liable to pay for goods sold and delivered pursuant to an unsealed contract; and Sanders *v.* Guardians of St. Neotts Union, 8. Q. B. 810, Haigh *v.* North Brierley Union, E. B. & E. 873, and Clarke *v.* Cuckfield Union, 21 L. J. Q. B. 349, are to the same effect. These cases are in direct conflict with those referred to in the text, to which may be added Frend *v.* Dennett, 4 C. B. N. S. 577, and in equity, 5 L. T. 73, N. S. The whole subject is in a most unsatisfactory state. See Mr. Pollock's excellent treatise on Principles of Contract, p. 130, *et seq.* edition 2.

(*k*) See as to this, South of Ireland Coll. Co. *v.* Waddle, L. R. 3 C. P. 463, and 4 ib. 617.

(*l*) See as to the last condition, Ebbw Vale Co. 8 Eq. 14, which, properly understood, is not inconsistent with the text.

(*m*) Edie *v.* The East India Co. 2 Burr. 1216, and Murray *v.* The East India Co. 5 B. & A. 204.

(*n*) Church *v.* The Imperial Gas Light Company, 6 A. & E. 846.

(*o*) Beverley *v.* The Lincoln Gas Co. 6 A. & E. 829. The judgment in this case deserves more attention than it has received.

(*p*) Henderson *v.* The Australian Royal Mail Steam Navigation Co. 5 E. & B. 409.

(*q*) Ebbw Vale Co. 8 Eq. 14; Denton *v.* East Anglian Rail. Co. 3 Car. & Kir. 16.

(*r*) South of Ireland Coll. Co. *v.* Waddle, L. R. 3 C. P. 463, and 4 ib. 617.

(*s*) Nicholson *v.* Bradfield Union, L. R. 1 Q. B. 621.

to admit a ship which they had agreed to admit in its turn. (*t*) On the other hand, it was held in a well-considered case, that a dock company was not bound by an unsealed agreement for cleansing its docks (*u*); and still more recently, that poor law guardians are not bound by an unsealed agreement engaging a clerk. (*x*) The exception in question, therefore, must still be applied with caution.

Part performance.

Another qualification of the general rule is founded upon the equitable doctrines of part performance. If a corporation has entered into an unsealed agreement which has been partly performed, and if the nature of the agreement and other circumstances are such as would induce a Court to decree specific performance of the contract if the parties to it were ordinary individuals, the Court will hold the corporation bound by the *355 *agreement, and will enforce it accordingly against or in favor of the corporation as the case may require. (*y*)

Ratification.

A corporation may obviously ratify, under seal, a contract previously entered into but not under seal; but whether any other ratification of a contract required to be under seal will bind the corporation is questionable. (*z*) It has, indeed,

Estoppel by record.

been said, that a corporation which sues upon an unsealed contract thereby irrevocably ratifies it by matter of record; and that the invalidity of the contract sued upon cannot avail as a defense to the action; and further, that if the corporation is afterwards sued upon the same contract, it would be estopped from denying its validity. (*a*) These propositions have, however, been denied by high authority and cannot be relied upon. (*b*)

(*t*) Wells *v.* The Mayor of Hull, L. R. 10 C. P. 402.

(*u*) London Dock Co. *v.* Sinnott, 8 E. & B. 347. But see on this case, South of Ireland Coll. Co. *v.* Waddle, *ubi sup.*

(*x*) Austin *v.* Guardians of Bethnal Green, L. R. 9 C. P. 91.

(*y*) See Crook *v.* Seaford, 10 Eq. 678, and 6 Ch. 551; London and Birmingham Rail. Co. *v.* Winter, Cr. & Ph. 57; Earl of Lindsey *v.* Great Northern Rail. Co. 10 Ha. 675; Laird *v.* Birkenhead Rail. Co. Johns. 500; Wilson *v.* West Hartlepool Rail. Co. 34 Beav. 187, and 2 De G. J. & Sm. 475; Marshall *v.* Corporation of Queensborough, 1 Sim. & Stu. 520; Maxwell *v.* Dulwich College, 7 Sim. 222; Stevens' Hospital *v.* Dyas, 15 Ir. Ch. 405. In Crampton *v.* Varna Rail. Co. 7 Ch. 562, the contract was not one which could be specifically enforced, and in Leominster Canal Co. *v.* Shrewsbury and Hereford Rail. Co. 3 K. & J. 654, there was nothing amounting to part performance in the sense in which that expression is used in equity.

(*z*) See the observations of Lord Blackburn, L. R. 9 Ex. 261.

[(*a*) Fishmongers' Co. *v.* Robertson, 5 Man. & Gr. 192.

(*b*) Mayor of Kidderminster *v.* Hardwick, L. R. 9 Ex. 13; Copper Miners' Co. *v.* Fox, 16 Q. B. 237;

If, however, a corporation is sued upon an unsealed agreement and judgment is obtained against it, the corporation will not be allowed afterwards to repudiate the agreement unless the judgment can be shown to have been obtained by fraud; or unless the agreement itself can be impeached for fraud and the question of fraud was not in issue in the action in which judgment was obtained. (*c*) Effect of a judgment.

*Before leaving the present subject, it may be observed that although an instrument sealed with the corporate seal is *primâ facie* valid, yet if the seal is essential to its validity, and if it be proved that the seal was improperly affixed, *e. g.*, was affixed by a person having no authority to use it, the instrument is void as a corporate act. (*d*) But those persons who in practice conduct a company's business, have implied authority to use its seal for the purposes of such business. (*e*) *356 Seal improperly affixed.

Statutory exceptions to the foregoing rule.

The general rule, that a corporation is not bound by any contract not under its common seal, applies to all incorporated companies, save where it has been abrogated by statute; whence it follows, that in order that an incorporated company may be bound by a contract entered into on its behalf, the contract must fall within one of the exceptions already referred to, or be under the common seal of the company, or be entered into in the manner and form directed by the statute which empowers the company to contract in some other mode. (*f*) Contracts of companies.

(*c*) See Williams *v.* St. George's Harbor Co., 2 DeG. & J. 547; Hulett's case, 2 J. & H. 306. In The Athenæum Life Assur. Soc. *v.* Pooley, 1 Giff. 102, and 3 DeG. & J. 294, debentures were set aside, although in Agar *v.* Athenæum, &c., Co. 3 C. B. N. S. 725, judgment had been obtained on another of like nature. But in the latter case the only plea was *non est factum*, and no question of fraud, even if there were any in that case, was raised. As to what fraud will avoid a deed at law, see Wright *v.* Campbell, 2 Fos. & Fin. 393.

(*d*) See Colchester *v.* Lowten, 1 V. & B. 243, 244; D'Arcy *v.* Tamar, &c., Rail. Co. L. R. 2 Ex. 158. Compare *Ex parte* The Contract Corporation, 3 Ch. 105.

(*e*) See *Ex parte* Contract Corp. 3 Ch. 105.

(*f*) Homersham *v.* The Wolverhampton Waterworks Co. 6 Ex. 137; Diggle *v.* The London and Blackwall Rail. Co. 5 Ex. 442; Cope *v.* The Thames Haven Co. 3 Ex. 841; Copper Miners' Co. *v.* Fox, 16 Q. B. 229; and see Ernest *v.* Nicholls, 6 H. L. C. 401.

It is important, therefore, to ascertain what statutory enactments there are bearing upon this subject.

Statutory enactments.

The Banking act, 7 Geo. 4, c. 46, and the Letters Patent act, 7 Will. 4 & 1 Vict. c. 73, leave the common law untouched as regards the question now under consideration. But companies regulated by these acts are not incorporated by them.

The Joint-stock companies registration act, 7 & 8 Vict. c. 110, §§ 44–46; the Joint-stock companies banking act, 7 & 8 Vict. c. 113, § 22; and the Joint-stock companies act of 1856, § 41, all contained provisions on this subject; but these acts are now repealed, and it is not necessary further to allude to them. (*g*)

*357 *(1) By the Metropolis gas act, 1860 (*h*), the contracts of gas companies regulated by that act and entered into in accordance with it are binding without any seal, if signed by two or more directors, or by the company's secretary, or other officer, by the authority of two or more directors.

(1) Metropolitan gas act.

(2) The Companies clauses consolidation act, 8 & 9 Vict. c. 16, renders it lawful for the directors of a company to which that act applies to appoint committees (§ 95), and enacts (§ 97) that the power of the committees as well as the power of the directors to make contracts on behalf of the company may lawfully be exercised as follows:—

(2) 8 & 9 Vict. c. 16.

"With respect to any contract, which if made between private persons, would be by law required to be in writing and under seal, such committee or the directors may make such contract on behalf of the company in writing and under the common seal of the company, and in the same manner may vary or discharge the same.

(*g*) Upon 7 & 8 Vict. c. 110, § 45, relating to bills and notes, see Halford *v.* Cameron's Coalbrook Co. 16 Q. B. 442; Edwards *v.* Cameron's Coalbrook Co. 6 Ex. 269; Aggs *v.* Nicholson, 1 H. & N. 165; Healey *v.* Story, 3 Ex. 3; Allen *v.* The Sea, Fire and Life Insurance Co. 9 C. B. 974; Gordon *v.* The Sea, Fire and Life Insurance Co. 1 H. & N. 599. As to § 44, relating to other contracts, see Ridley *v.* The Plymouth Grinding Co. 2 Ex. 711; *Ex parte* Eagle Insur. Co. 4 K. & J. 549; Hambro' *v.* Hull and London Fire Insur. Co. 3 H. & N. 789; British Empire Co. *v.* Browne, 12 C. B. 723. As to § 29, relating to contracts with directors, see Stear's case, Johns. 480; Ernest *v.* Nicholls, 6 H. L. C. 401; Curteis *v.* Anchor Insur. Co. 2 H. & N. 537; Poole *v.* National Provincial, &c. Assurance Society, ib. 687; Murray's Ex. ca. 5 De G. M. & G. 746; Teversham *v.* Cameron's Coalbrook, &c. Rail. Co. 3 DeG. & S. 296; Baker's case, 1 Dr. & Sm. 55.

(*h*) 23 & 24 Vict. c. 125, § 20. Quære what the words "entered into in accordance with this act" really mean.

"With respect to any contract, which if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing, signed by such committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same.

"With respect to any contract which, if made between private parties, would by law be valid though made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same."

This enactment does not render a company liable on a *contract entered into by its directors in writing, but not purporting to bind the company (*i*); nor on a contract required to be under seal or signed by two directors, but which is neither under seal nor so signed, although the company may have had the benefit of the contract. (*k*) Moreover, notwithstanding the general words of the last clause of the enactment, it has been decided that where a company has entered into a contract in proper form for the execution of certain specified works, it is not bound to pay for extra works not done under the contract, although they may have been done by the orders and under the superintendence of the officer appointed by the directors to see the specified works properly executed. (*l*) At the same time, where the company has had the benefit of a contract which, if entered into between ordinary individuals would be valid, although not in writing, it will be presumed, in the absence of evidence to the contrary, that such contract was duly made by the directors of the company or a committee of them, or by an agent duly appointed, so as to be binding on the company. Upon this principle a railway company has been held liable to pay for the use and occupation of land occupied by it for the purposes of its business (*m*); and to pay for sleepers furnished to the company at the

*358 Cases on this act.

(*i*) See Serrell *v.* The Derbyshire, &c. Rail. Co. 9 C. B. 811.

(*k*) Leominster Canal Co. *v.* The Shrewsbury and Hereford Rail. Co. 3 K. & J. 654. See, too, Diggle v. London and Blackwall Rail. Co. 5 Ex. 442; Midland Great Western Rail. Co. of Ireland *v.* Johnson, 6 H. L. C. 798. But see as to cases of part performance, *ante*, p. 354.

(*l*) Homersham *v.* Wolverhampton Waterworks Co. 6 Ex. 137. See, further, as to extra works, Ranger *v.* The Great Western Rail. Co. 5 H. L. C. 72; and Nixon *v.* The Taff Vale Rail. Co. 7 Ha. 136; Kirk *v.* The Bromley Union, 2 Ph. 640; Lamprell *v.* The Billericay Union, 3 Ex. 283.

(*m*) Lowe *v.* The London and North-Western Rail. Co. 18 Q. B. 632. See Finlay *v.* The Bristol and Exeter Rail. Co. 7 Ex. 409.

request of its engineer (*n*); although there was nothing in either case to show that any express written or parol contract had been entered into on behalf of the company by its directors or any committee of them.

Ordinary individuals can appoint agents verbally; and the 4th and 17th sections of the Statute of Frauds, which in *certain cases require contracts to be evidenced by some writing signed by the party to be charged, or his agent, do not render it necessary that the agent there spoken of should be appointed in writing. (*o*) Hence arises a question, whether a written contract entered into on behalf of a railway company for the purchase of land, and signed by its agent, is not binding on the company, although the agent may not have been appointed under seal or by any writing signed by two directors or members of a committee. The writer is not aware of any decision on this point (*p*), and he leaves it, therefore, for the consideration of the reader, merely observing that *probably* the case was intended to be provided for by the second branch of the 97th section of the Companies clauses act; although agents not being there mentioned, the language does not adequately express such intention.

The Statute of Frauds and the Companies clauses acts.

*359

It is beyond the scope of the present work to treat of the method in which companies governed by special acts of Parliament and the Lands clauses act can obtain land for the purpose of their undertakings; but it is not altogether irrelevant to observe that where parties have agreed to refer questions of disputed compensation under that act to arbitration, the appointment of an arbitrator on the part of the company may be made by the secretary. (*q*)

The Lands' clauses act.

(*n*) Pauling *v.* The London and North-Western Rail. Co. 8 Ex. 867. See further on this subject, *ante*, p. 354.

(*o*) Coles *v.* Trecothick, 9 Ves. 250; Clinan *v.* Cooke, 1 Sch. & Lef. 31. Maclean *v.* Dunn, 4 Bing. 722, shows that a verbal ratification of a previously unauthorized agreement signed by an agent renders the agreement binding on the principal.

(*p*) See Wilson *v.* West Hartlepool Rail. Co. 34 Beav. 187, and 2 DeG. J & Sm. 475, where, however, this point was not alluded to. In Jones *v.* Victoria Graving Dock Co. 2 Q. B. D. 314, a minute signed by the chairman of the board of directors of a company registered under the Companies Act, 1862, was held a sufficient memorandum of a contract to satisfy the 4th section of the Statute of Frauds.

(*q*) Collins *v.* South Staffordshire Rail. Co. 7 Ex. 5.

(3) The Companies act of 1856 contained a clause (*r*) similar to that which occurs in the Companies clauses consolidation act (*s*); and although the act of 1856 is repealed, it has been decided that companies formed and registered under it may still be bound by unsealed contracts. (*t*) The Companies act, 1862, contained no similar clause; but this defect has been cured by the Companies act, 1867. (*u*)

(3) The Companies act, 1862.

*The Companies act, 1862, expressly enacts that promissory notes and bills of exchange shall be deemed to be made, accepted, or indorsed on behalf of a company registered under the act, if made, accepted, or indorsed in the name or by or on behalf or on account of the company, by any person acting under its authority. (*x*) A bill or promissory note may be under seal. (*y*) *360

Promissory notes and bills of exchange.

The act also provides for the appointment by a company under its common seal, of agents to execute deeds abroad, and renders deeds executed by them as valid as if sealed by the company (*z*). This provision has been extended by a subsequent act of Parliament (*a*) which authorizes companies governed by the Companies act, 1862, and carrying on business in foreign countries, to keep duplicate common seals there, having engraved upon them the name of the place in which they are to be used. The act, however, only applies to companies expressly authorized by their articles of association, or a special resolution to exercise the powers given by the act; and the persons entrusted with the seals must be specially empowered to use them by some instrument in writing under the common seal of the company. Instruments sealed by such persons in the place to which the seal entrusted to them applies, are as binding on the company as if such instruments had been sealed in this country with the ordinary common seal.

Deeds executed abroad.

Companies seals act, 1864.

(*r*) 19 & 20 Vict. c. 47, § 41.

(*s*) *Ante*, p. 357.

(*t*) Prince *v.* Prince, 1 Eq. 490.

(*u*) 30 & 31 Vict. c. 131, § 37, which is similar to 8 and 9 Vict. c. 16, § 97, above set out. See, as to the act of 1862, South of Ireland Coll. Co. *v.* Waddle, L. R. 3 C. P. 463, and 4 ib. 617, and Totterdell *v.* Fareham Brick Co., L. R. 1 C. P. 674.

(*x*) § 47. *Ex parte* Overend, Gurney & Co. 4 Ch. 460; *Re* Barber & Co. 9 Eq. 725.

(*y*) *Ex parte* City Bank, 3 Ch. 758; *Ex parte* Colborne & Strawbridge, 11 Eq. 478.

(*z*) § 55.

(*a*) 27 & 28 Vict. c. 19. It has not been thought necessary to print this act in the appendix, and its general effect only is attempted to be given above.

*361 *SECTION VII.—LIABILITY OF PARTNERSHIPS AND COMPANIES IN RESPECT OF CONTRACTS NOT BINDING ON THEM, BUT OF WHICH THEY HAVE HAD THE BENEFIT.

Effect of having had the benefit of a contract.

It is an erroneous but popular notion that if a firm obtains the benefit of a contract made with one of its partners, it must needs be bound by that contract. Now, although the circumstance that the firm obtains the benefit of a contract entered into by one of its members, tends to show that he entered into the contract as the agent of the firm (*b*), such circumstance is no more than evidence that this was the case, and the question upon which the liability or non-liability of the firm depends is not—Has the firm obtained the benefit of the contract? but Did the firm, by one of its partners or otherwise, enter into the contract? (*c*)

Emly v. Lye.

A leading case on this head is Emly *v.* Lye. (*d*) There a partner drew bills in his own name, and sent them to an agent of the firm in order that he might get them discounted. They were discounted, and the money obtained was remitted by the agent, and was paid to the account of the firm. It was held that the firm was neither liable for the amount of the bills on the bills themselves, nor for their proceeds on the common counts. There was no loan to the partnership; no contract with it; and no liability attached to the firm by the fact that the partner who alone was liable had applied the money after he got it for the benefit of his co-partners as well as for the benefit of himself.

Bevan v. Lewis.

Again, in Bevan *v.* Lewis (*e*), one partner borrowed money, and executed warrants of attorney to confess judgment. The money which he obtained was applied by him for the benefit of the partnership, and was obtained in part with the knowledge of his co-partner, in order that it might be so *362 applied. *But it was held that the partnership was not liable for the money; the loan having been clearly made to

(*b*) *Per* Rolfe, B. in Beckham *v.* Drake, 9 M. & W. 99, 100.

(*c*) *Per* Rolfe, B. *ubi supra.* See, too, Kingsbridge Flour Mill Co. *v.* The Plymouth Grinding Co. 2 Ex. 718; Ernest *v.* Nicholls, 6 H. L. C. 423. Similarly, the fact that one partner only has obtained the benefit of a contract, does not show conclusively that the firm is not bound, *Ex parte* Bonbonus, 8 Ves. 544.

(*d*) 15 East, 7.

(*e*) 1 Sim. 376.

the one partner against whom alone judgment was to be entered, and not to the firm through him. So, in ordinary cases, when one partner borrows money without the authority of his co-partners, the contract of loan is with him and not with the firm; and the nature of that contract is not altered by his application of the money. The lender of the money has, therefore, no right to repayment by the firm, although the money may have been applied for its benefit. (*f*)

Money borrowed by one partner.

The same rule applies to goods, services, and works supplied to or done for one partner, either on his own account, or if for the firm, at the request of one of its members acting beyond the limits of his apparent as well as of his real authority. The firm does not, in any case of this sort, enter into any contract, express or implied, with the person dealing with the partner in question, and does not incur any obligation towards that person by reason of the circumstance that it gets the benefit of what he has done. (*g*) The principle of these decisions governs those cases in which one partner in breach of trust, but without the knowledge or consent of his co-partners, applies trust money over which he has control as a trustee, to the purposes of the firm. The fact that the firm has been benefited by the money in question does not render it liable to the owners of the money. (*h*)

Goods supplied to one partner.

Similar principles apply to companies. It has been already seen, that in those cases in which a company can only bind *itself under seal it is not liable on contracts of which it has had the benefit, unless the equitable doctrine of part performance is applicable to the case (*i*); and, as will be seen hereafter, a

*363

Application of these principles to companies.

(*f*) See Smith *v.* Craven, 1 Cr. & J. 500; Hawtayne *v.* Bourne, 7 M. & W. 595; Burmester *v.* Norris, 6 Ex. Ricketts *v.* Bennett, 4 C. B. 686; The Worcester Corn Exchange Co. 3 DeG. M. & G. 180; Fisher *v.* Tayler, 2 Ha. 218. In all these cases the firm got the benefit of the money borrowed, and yet was held not liable to repay it. Compare with them *Ex parte* Chippendale, 4 DeG. M. & G. 19.

(*g*) See, in addition to the cases already cited, Kingsbridge Flour Mill Co. *v.* Plymouth Grinding Co. 2 Ex. 718; Lloyd *v.* Freshfield, 2 Car. & P. 325, and 9 Dowl. & R. 19; Galway *v.* Matthew, 10 East, 264, *ante*, p. 329, note (*z*); Kilgour *v.* Finlyson, 1 H. Blacks. 155; *Ex parte* Wheatly, Cooke's Bank. Law, 534, ed. 8; Ball *v.* Lanesbrough, 5 Bro. P. C. 480; *Ex parte* Peele, 6 Ves. 603, 604; *Ex parte* Hartop, 12 ib. 352.

(*h*) *Ex parte* Apsey, 3 Bro. C. C. 265; *Ex parte* Heaton, Buck. 386. See *ante*, p. 311.

(*i*) *Ante*, p. 353.

company is not, under ordinary circumstances, liable on contracts entered into by its promoters, although it may have had the benefit of such contracts. (*k*) It may, therefore, be taken to be established that a partnership or company, not liable on a contract when entered into, does not become liable upon it by reason of having benefited by it; and further, that a company or partnership which has benefited by a contract, not binding on it, is not to be deemed to have thereby ratified that contract; nor to have incurred an obligation *quasi ex contractu*, similar to that which would have been incurred if the contract had been binding on the firm or company in the first instance. (*l*)

Recovery of consideration which has failed

At the same time, a company is liable to refund money which it has received without consideration, *e. g.*, premiums paid to it in respect of policies which it had no power to grant. (*m*)

and of money applied in discharging liabilities.

Moreover, it has been decided in equity that a company is liable to refund money improperly borrowed by its directors and applied in discharging previously contracted debts of the company. (*n*) The persons who advance money so applied, are substantially equitable assignees of the debts paid off, and are entitled to rank as creditors of the company, on a principle similar to that by which a person who advances money to an infant and which money is expended in necessaries, is entitled in equity to rank as a creditor of such infant. (*o*)

A combination of these two principles affords an explanation of certain cases in which transferees of debentures issued by a *364 company, *ultra vires*, have been held entitled to recover *from the company the value of the consideration received by it for such debentures.

Athenæum Assurance Society v. Pooley.

Thus in the grossly fraudulent case of the Athenæum Life Assurance Society *v.* Pooley, (*p*) where debentures of a company given in exchange for Westminster improve-

(*k*) Hutchinson *v.* Surrey Gas Co. 11 C. B. 639; Payne *v.* New South Wales Coal Co. 10 Ex. 283.

(*l*) *Ex parte* Williamson, 5 Ch. 309; Cork and Youghal Rail. Co. 4 Ch. 748; Hill's case, 9 Eq. 605; Chambers *v.* Manchester and Milford Rail. Co. 5 B. & S. 588. See, also, *per* Parke, B. in Homersham *v.* Wolverhampton Waterworks Co. 6 Ex. 142, and the cases in the last few notes.

(*m*) Phœnix Ass. Co. Burges' and Stock's case, 2 J. & H. 441.

(*n*) Cork and Youghal Rail. Co. 4 Ch. 748; National Permanent Benefit Building Soc. 5 Ch. 309; Magdalena Steam Nav. Co. Johns. 690.

(*o*) *Ante*, p. 273, note (*n*).

(*p*) 3 DeG. & J. 294.

ment bonds, were decided to be invalid in the hands of a *bonâ fide* purchaser for value, the purchaser was held entitled to an inquiry whether the company had received any benefit from the bonds. Again in the similar and subsequent cases of Wood's Claim and Brown's Claim, (*q*) Westminster bonds were sold to an insurance company for money debentures and shares. The transaction was held invalid; and it appearing that the bonds were worth more than the company gave for them, and that the company had had the benefit of the excess, the company was debited with such success in an account directed between the company and the vendor; and he, on the other hand, was debited with the money paid to him by the company, and with the sums realized by him by the sale of the debentures and shares.

Wood's Claim.

These cases, it will be observed, were cases in which claims were made by strangers against the company. They were not cases in which directors claimed to be indemnified by shareholders, as in the German Mining Company's case. (*r*) At the same time the principles there laid down paved the way to the decisions above noticed; and there was a tendency in equity to extend these principles too far; but more modern decisions have checked this tendency. (*s*)

Observations on these cases.

(*q*) 9 W. R. 366, and 10 ib. 662.

(*r*) 4 DeG. M. &. G. 14. This case will be alluded to hereafter.

(*s*) See National Permanent Benefit Building Soc. 5 Ch. 309.

*365

*CHAPTER II.

OF THE NATURE, EXTENT, AND DURATION OF THE LIABILITY OF INDIVIDUAL MEMBERS OF PARTNERSHIPS AND COMPANIES TO CREDITORS.

Nature and extent of a partner's liability.

HAVING examined in the preceding pages the liabilities of partnerships and companies for the acts of their agents, it is proposed in the present chapter to investigate the liability of individual partners and shareholders in respect of such obligations as upon the principles already discussed are imputable to partnerships and to companies as aggregate bodies.

The liability of shareholders to the creditors of their companies depends not only on the principles which are applicable to ordinary partnerships, but also on important statutory enactments, to which it will therefore be necessary to allude; but in order to avoid as far as possible the inconvenience of breaking a continuous exposition of those principles, the detailed examination of the enactments in question will be postponed, and will be found partly in that section of the next chapter which treats of execution against companies and their shareholders, and partly in that part of the work which treats of the winding up of companies.

SECTION I.—NATURE OF THE LIABILITY.

1. *As regards contracts.*

A. *Persons who are liable.*

No several liability on contracts binding the firm.

An agent who contracts for a known principal, is not liable to be himself sued on the contract into which he has avowedly entered only as agent. Consequently, a partner who enters into a contract on behalf of his firm, is not

liable on that *contract except as one of the firm; in other *366
words, the contract is not binding on him separately, but only on him and his co-partners jointly. (*a*) One partner may render himself separately liable by holding himself out as the only member of the firm (*b*); or by so framing the contract as to bind himself not only as belonging to the firm, but independently of his connection with it (*c*);[1] but unless there are some special circumstances of this sort, a contract which is binding on the firm is at law binding on all (*d*) the partners jointly and on none of them severally.

Nor on contracts binding on the company.

The same principle applies to directors of companies. Contracts entered into by them only as agents of the company, are binding, if at all, on the company, and the directors cannot be made individually liable upon them as principals. (*e*) The only exception to this rule is, that a director contracting for a limited company and suppressing the word "limited," is liable personally on the contract. (*f*)

Position of agent who exceeds his authority.

Formerly it was thought that if an agent entered into a contract on behalf of a principal, and such contract did not bind the principal, he not having authorized it, the agent was himself bound by the contract. According to this doctrine, a contract ostensibly entered into by A. through B. was treated as a contract by B., although it was not the intention of either party to the contract that B. should be in any way bound by it. The propriety of thus making contracts for persons has, however, been very properly questioned and denied; and it is now held that an agent contracting as such without authority, is not bound *by the contract* at all, but that he is liable in damages for the consequences ensuing from his having assumed to act with an authority which in fact he did not possess.[2] It is

(*a*) See *Ex parte* Buckley, 14 M. & W. 469; *Re* Clarke, DeGex, 153; *Ex parte* Wilson, 3 M. D. & D. 57.

(*b*) Bonfield *v.* Smith, 12 M. & W. 405; De Mautort *v.* Saunders, 1 B. & Ad. 398.

(*c*) See *ante*, p. 339 *et seq.* and Higgins *v.* Senior, 8 M. & W. 834; *Ex parte* Wilson, 3 M. D. & D. 57.

[1] See *ante*, 339, note.

(*d*) Not excluding dormant partners. Beckham *v.* Drake, 9 M. & W. 79; Brett *v.* Beckwith, 3 Jur. N. S. 31, M. R.

(*e*) Lindus *v.* Melrose, 2 H. & N. 293, and 3 ib. 177; Aggs *v.* Nicholson, 1 H. & N. 165; Russell *v.* Reece, 2 Car. & Kir. 669.

(*f*) 25 & 26 Vict. c. 89, §§ 41 and 42; Penrose *v.* Martyr, E. B. & E. 499.

[2] See, generally, Ewell's Evans on Agency, *300 *et seq.* and notes.

*367 *also held that he is thus liable although he acted *bonâ fide* and in the belief that he had the authority he assumed. (*g*)

These principles are as applicable to partners and directors as to other kinds of agents. (*h*) But with respect to directors, it must not be forgotten that in most cases the limits of their authority can be readily ascertained, and are supposed to be known (*i*); and a person who deals with directors whom he knows to be exceeding their authority, cannot complain of them if he finds that their acts are repudiated. He deliberately runs the risk of such repudiation. In the absence, therefore, of fraud on their part, such a person will be unable to obtain any redress against them. Moreover, they are not liable for honest mistakes as to the legal extent of their authority. (*k*)

Personal liability of directors who exceed their powers.

Thus, where a person advanced money to a company on the security of an invalid Lloyd's bond of the company, the directors who issued it were held not to be personally liable to repay the money advanced. (*l*) So where a person bought new preference stock of a railway company which both he and the directors *bonâ fide* believed they had power to issue, but which in truth they had not, it was held that he had no remedy against them, for there was nothing more than a common mistake of law. (*m*)

But directors, like other agents, impliedly warrant all facts necessary to confer the authority which they profess to exercise. Therefore, where a company had power to borrow, but the power had been already exhausted, and the directors nevertheless raised more money, they were held personally liable to repay it. (*n*)

*368 So, where the directors of a benefit *building society had power to borrow, if a rule enabling them to do so had been

(*g*) See on this subject the cases referred to in the next seven notes, and Jenkins *v.* Hutchinson, 13 Q. B. 744; Lewis *v.* Nicholson, 18 Q. B. 503; Randell *v.* Trimen, 18 C. B. 786; Collen *v.* Wright, 7 E. & B. 301, and 8 ib. 647; Simons *v.* Patchett, 7 ib. 568; Dickson *v.* Reuter's Telegraph Co. 3 C. P. D. 1. Eastwood *v.* Bain, 3 H. & N. 738, where the plaintiff had not sustained damage.

(*h*) Godwin *v.* Francis, L. R. 5 C. P. 295; Ferguson *v.* Wilson, 2 C. H. 77.*

(*i*) See as to this, *ante*, p. 252. Wilson *v.* Miers, 10 C. B. N. S. 348, was an action against directors for exceeding their authority, but the Court was of opinion that there was no excess, and decided against the plaintiff on that ground.

(*k*) Beattie *v.* Lord Ebury, L. R. 7 Ch. 777, and 7 H. L. 102, and the cases in the next two notes.

(*l*) Rashdall *v.* Ford, 2 Eq. 750.

(*m*) Eaglesfield *v.* Marquis of Londonderry, 4 Ch. D. 693.

(*n*) Weeks *v.* Propert, L. R. 8 C. P. 427.

passed, and they borrowed money for the society in the absence of any rule enabling them so to do, it was held that they were personally liable to repay it. (*o*) So, where directors of a company authorized the manager to overdraw the company's account, they were held liable for the overdraft, for although the company had no power to borrow without the consent of a meeting of shareholders, they had power to do so with such consent. (*p*)

Contracts with promoters of companies.

Further, where a person purports to contract as an agent, and he has in truth no principal; so that the contract, unless binding on the party to it, is wholly void, he is treated as having contracted on his own behalf, and is personally liable accordingly.[1] Thus, if a person contracts on behalf of a company not yet formed, he is liable on that contract; and he is not relieved from such liability by the subsequent adoption of the contract by the company when formed (*q*), unless the contract is so worded as to exclude personal liability.

Express personal liability.

Again, if directors contract as principals, which is quite consistent with their acting on behalf of the company (*r*), they will be bound personally by their contract, provided it is not actually illegal. The fact that the contract is one which would not bind the company is not *per se* sufficient to render it void as against the directors personally. Therefore, where the directors of a company disagreed and divided into two parties, and one party retired, and the other party covenanted to indemnify them, this covenant was held binding on the directors who entered into it, irrespectively of the question how far the whole transaction was one which the directors had power to enter into on the part of the company. (*s*) But if the contract is illegal, no action can be maintained upon it; and therefore, where the directors of a railway company agreed that it should *pay the expenses *369 which might be incurred by another company in attempting to obtain an act of Parliament for the formation of a line which,

(*o*) Richardson *v.* Williamson, L. R. 6 Q. B. 276, explained by Mellish, L. J. in 7 Ch. 801.

(*p*) Cherry *v.* Col. Bank of Australasia, L. R. 3 P. C. 24.

[1] See 2 Kent Com. 630; Ewell's Evans on Agency, 308, note; Blakely *v.* Bennecke, 59 Mo. 193; Eichbaum *v.* Irons, 6 W. & S. 67.

(*q*) Kelner *v.* Baxter, L. R. 2 C. P. 174; Scott *v.* Lord Ebury, ib. 255.

(*r*) See Kay *v.* Johnson, 2 Hem. & M. 118, in which a decree for the specific performance of an agreement for a lease was made against directors personally.

(*s*) Haddon *v.* Ayres, 1 E. & E. 118; Barker *v.* Allan, 5 H. & N. 61.

when made, was to be handed over to the first company, it was held that this was an agreement to the effect that the first company should do that which was altogether illegal, and that an action against the directors for a breach of the agreement could not be sustained. (*t*)

B. *Liability, several as well as joint.*

Equitable liability several as well as joint.

Before the Judicature Acts there was a marked difference between the views taken at law and in equity with reference to the nature of partnership debts; for whilst at law they were all joint, so that on the death of one partner the survivors became solely liable for them,[1] in equity they were all, *primâ*

(*t*) Macgregor *v.* Dover and Deal Rail. Co. 18 Q. B. 618.

[1] See *post*, Survivorship; Williams *v.* Rayers, 14 Bush, 777; Curry *v.* Warrington, 5 Harr. 147.

One who brings suit against partners must show the existence of a joint contract or joint promise, express or implied. Sager *v.* Tupper, 38 Mich. 258.

In an action against several as partners, although but one of the defendants be brought into court, if he appears and pleads the general issue, the plaintiff is not entitled to recover, unless he establishes a joint liability of the defendants. Halliday *v.* McDougal, 20 Wend. 81; 22 Id. 264.

A partnership between four was dissolved by the death of one, and letters of administration on his estate were taken out by a surviving member. The survivors, having formed a new firm, took the stock, and each gave his note for one-third of said stock, at an appraised value, payable to the firm: *Held*, that the three were chargeable jointly for the whole value of the stock. Washburn *v.* Goodman, 17 Pick. 519.

A suit was brought against two as partners; both were served with process; both appeared and pleaded jointly; notice to produce a book containing the contract on which the action was brought was given to both, and it was produced. The contract was in the name of the firm, and was proved to be in the handwriting of one of the defendants. Upon the trial, an admission was made by the counsel acting for both defendants, that a certain amount of labor was done by plaintiff for defendants, and certain payments made to him: *Held*, that the evidence was sufficient to establish a joint liability on the part of the defendants. Balliet *v.* Fink, 28 Pa. St. 266.

In an action against A. & W., former partners, on an alleged joint indebtedness for goods sold and delivered, A.'s answer denied the sale and delivery, but admitted that the goods were left with the defendants for sale on commission, and that sales of the same were made to a certain amount, for which an indebtedness was admitted; and W.'s answer admitted in part the sale and delivery and indebtedness alleged. The plaintiffs in reply denied the statement in A.'s answer, and moved for judgment on the pleadings: *Held*, that the motion was rightly denied, and judgment of dismissal properly rendered. Such a state of the pleadings furnishes no basis for a several judgment against either of the defendants. Beatty *v.* Ambs, 11 Minn. 331.

facie, separate as well as joint, so that on the death of a partner his

If a partnership and an individual are joint makers of a note, when nothing appears to the contrary, the partnership is liable for one-half the amount of the note. Hosmer *v.* Burke, 26 Iowa, 353.

The liability of a partner is to be determined by the law of the place where the partnership is carried on, and not where the debt was incurred. Hastings *v.* Hopkinson, 28 Vt. 108.

In some of the States, either by statute or decisions of the courts, partnership debts are considered as both joint and several. In Mississippi all partnership contracts are declared by statute to be joint and several; therefore, in a suit against one partner, counts on a firm debt for which he is severally liable, may be joined with counts on an individual debt, but if the creditor treat the contract as joint, by suing all the partners, he must prove a joint contract as alleged, and cannot amend by discontinuing as to part of the defendants and joining a count on a contract by one only, in order to meet the proof which is of such a contract. Miller *v.* Northern Bank, etc. 34 Miss. 412.

In Strong *v.* Niles, 45 Conn. 52, a firm was dissolved, and part of its members, as a new firm, went on with the business. The plaintiff, who had been a book-keeper of the old firm, kept on with the new, and carried a balance due him for services from the old firm into his account with the new; and his account thus made up was afterwards paid by the new firm, they not knowing that it embraced any part of the old account: *Held*, that as the members of the new firm were personally liable for the debts of the old, the plaintiff was entitled to retain the money so received.

See, also, Griffin *v.* Samuel, 6 Mo. 50; Wilson *v.* Home, 37 Miss. 477; Neil *v.* Childs, 10 Ired. L. 195; Silverman *v.* Chase, 90 Ill. 37; Mason *v.* Tiffany, 45 Ill. 392.

The rights of partnership creditors are not affected by equities between the partners. Bartels *v.* Creditors, 11 La. Ann. 433.

In an action against the members of an unincorporated association, sued as partners, the court will not delay the relief to which the plaintiff is entitled as against all the defendants, pending an inquiry instituted by the defendants to ascertain which of them, as between themselves, is primarily liable for the debt. Manning *v.* Gasharie, 27 Ind. 399.

Where H. individually, and T. individually, signed an agreement, whereby they agreed to account to D. for the proceeds of certain bills of lading, which were simultaneously delivered by D. to H. for himself and T., they being partners, and for any insurance money which should be received as such proceeds, until certain drafts accepted by D., for account of such partnership, against the goods covered by the bills of lading, should be provided for, the bills of lading having been held by D. as security for such acceptances, and the goods having been insured by such partnership, in the name of H., and having been lost at sea: *Held*, that T. and H. were liable, the two jointly, and each of them individually, to fulfill such agreement; and, T. and H. having become insolvent, and assigned their partnership, as well as their individual estates, for the benefit of their creditors, that D. had a right, at his election, to come in under such assignment, as a creditor of T. and H., individually, and to exhaust his remedy thereunder, against the separate estate of each of them, and afterward come in on the surplus of the joint estate of the two, after the payment of the joint debts of the two. Drake *v.* Taylor, 6 Blatchf. 14.

estate remained liable for them. (*u*)[1] Whilst all the partners were alive this equitable doctrine had practically no effect; for courts of equity had no jurisdiction to enforce payment of ordinary debts recoverable by action; and although courts of bankruptcy exercised both legal and equitable jurisdiction, a partnership debt was treated as a joint debt provable against the joint estate of the partners, and not as a joint and separate debt provable either against their joint or against their separate estates at the option of the creditor. (*x*) The effect of the Judicature Acts upon this subject is, it is apprehended, to render the estate of a deceased partner liable for all ordinary partnership debts and to enable creditors of a firm to maintain an action against the executors of a deceased partner in respect of them; but it must not be too hastily assumed that for all purposes partnership debts must now be treated as separate as well as joint: a partnership debt is not so treated in bankruptcy since the Judicature Acts any more than before.

The equitable doctrine on this subject is a consequence of *370 *the rules which regulate the application of partnership assets in the event of the death of a partner. As will be seen hereafter, those assets do not belong beneficially to the surviving partners, but must be applied first in payment of the partnership debts and then be divided between the survivors and the estate of the deceased, according to their respective shares; and if there is a deficiency of assets, the partners are

Equitable doctrine illustrated.

(*u*) Except in partnership cases the liability in equity on a joint contract is joint as at law; Other *v.* Iveson, 3 Drew. 177; Jones *v.* Beach, 2 DeG. M. & G. 886; Rawstone *v.* Parr, 3 Russ. 539. See as to joint and several contracts, Kendall *v.* Hamilton, decided by Baron Huddleston on 19th March, 1878. There a partnership contract, which before the Judicature Act would have been at law clearly jointly only, was held to be joint and several; an action on the contract against two out of three partners followed by judgment, was held to be no bar to a subsequent action on the same contract against a third partner, whose connection with the firm was not known when the first action was brought. It certainly would be absurd to hold that whether a contract is to be treated as joint or as joint or several, is to depend upon whether one of the parties happens to die. The rules in bankruptcy relating to the proof of joint debts will probably still remain; trade debts being paid out of trade assets; but it is to be hoped that all partnership contracts will, as a rule, be henceforward treated as joint and several, both in ordinary actions and in actions for administration. The case is under appeal.

[1] See Mason *v.* Tiffany, 45 Ill. 392; Silverman *v.* Chase, 90 id. 37.

(*x*) See *infra*, book iv. ch. 2, § 4.

entitled to contribution from the estate of the deceased. But, further, it has long been held that a creditor of the firm is himself entitled to obtain payment from the estate of the deceased (*y*); even although he may have taken as a security for his debt a bond or covenant binding the partners jointly. (*z*)

Thus, in Bishop *v.* Church (*a*), two partners borrowed 2000*l.*, for which they afterwards gave their joint bond. One of them then died, and the other became bankrupt. A bill was filed by the creditor for payment of the bond out of the estate of the deceased partner; and it was held that his estate continued liable notwithstanding that it was discharged at law, the bond being joint and not joint and several. In this case, it was also held that the bond ought to be treated as joint and several so as to make the estates of the deceased partner liable as for a specialty debt and not as for a simple contract debt, as would have been the case without the bond, (*b*) Bishop *v.* Church.

In Beresford *v.* Browning (*c*), now the leading case on this subject, four partners agreed that on the death of any of them the survivors should not be bound to pay out his capital at once, but should pay it by certain instalments, as ascertained at the last preceding stock-taking. The agreement did not *purport to bind the survivors jointly and severally. *371 But it was held that, even if they were at law bound only jointly, they were liable in equity severally as well as jointly; for the agreement was nothing more than an arrangement for carrying out a pre-existing joint and several liability. Beresford *v.* Browning.

Nor, if the creditor sues the surviving partners and obtains judgment against them, will he be therefore precluded from proceeding to enforce his original claim against the es- Effect of judgment.

(*y*) Hoare *v.* Contencin, 1 Bro. C. C. 27, shows that this was not always the case.

(*z*) See, in addition to the cases cited in the next few notes, Primrose *v.* Bromley, 1 Atk. 90; Darwent *v.* Walton, 2 Atk. 510; Lane *v.* Williams, 2 Vern. 292; and see Sleech's case, 1 Mer. 539; Devaynes *v.* Noble, 2 R. & M. 495, and the cases there commented on; Smith *v.* Smith, 3 Giff. 263. The cases only relate to mercantile partnerships, but quære if there is any difference in this respect between them and other partnerships.

(*a*) 2 Ves. S. 100 and 371. Simpson *v.* Vaughan, 2 Atk. 31, is a very similar case.

(*b*) The following cases are to the same effect as Bishop *v.* Church, viz., Simpson *v.* Vaughan, 2 Atk. 31; Thomas *v.* Frazer, 3 Ves. 399; Burn *v.* Burn, ib. 573; Orr *v.* Chase, 1 Mer. 729, Appendix.

(*c*) 20 Eq. 564, and 1 Ch. D. 30.

tate of the deceased partner. (*d*) In the case here supposed the judgment does not affect his estate.

Effect of rule on creditors inter se.

The doctrine acted on in Bishop *v.* Church and other cases of the same sort, is applied not only for the benefit of creditors against the partners and their representatives, but also as between competing creditors. This was settled in Burn *v.* Burn. (*e*) In that case, partners being indebted to a large amount, gave to their creditor a joint bond; one of the partners died; the others afterwards became insolvent; and a bill was filed by the bond creditor for payment out of the estate of the deceased partner. Two questions then arose between the plaintiff and the simple contract creditors of the deceased partner, viz., first, whether the plaintiff could rank as a creditor at all against the assets of the deceased? and, secondly, whether, if he could, he should rank as a specialty or only as a simple contract creditor? The Court decided both questions in favor of the plaintiff, and held that he was entitled to rank as a specialty creditor, although the consequence was that after satisfying his demand, little remained for payment of the other creditors.

Burn *v.* Burn.

Cases where the equitable and legal liabilities are the same.

But it must not be supposed that in equity every liability contracted by partners is several as well as joint. It is a question of intention on the part of the firm and on the part of those with whom it deals. If, therefore, partners enter into a contract binding themselves jointly and not severally, and if such contract is not a mere security for the payment of a debt, or for the performance of a joint and several obligation, and if it has not been made joint in form by mistake, the effect *372 of the *contract will be in equity as in law to impose a joint obligation and no other. (*f*)

Sumner *v.* Powell.

A leading case on this head is Sumner *v.* Powell. (*g*) There one of a firm of partners died, the firm being at the time of his death liable for a breach of trust committed by one of its members. A new partner was admitted into the firm, and a deed was executed between the executors of the deceased partner

(*d*) Liverpool Borough Bank *v.* Walker, 4 DeG. & J. 24; Jacomb *v.* Harwood, 2 Ves. Sen. 265.

(*e*) 3 Nes. 573, and see Simms *v.* Barry, there cited.

(*f*) See, in addition to the cases noticed in the text, Richardson *v.* Horton, 6 Beav. 185; Jones *v.* Beach, 2 De G. M. & G. 886; Other *v.* Iveson, 3 Drew. 177; Rawstone *v.* Parr, 3 Russ. 424, 539.

(*g*) 2 Mer. 30, affirmed on appeal, T. & R. 423.

and the surviving partners and the new partner, whereby, in consideration of certain payments by the executors and of a release by them of all demands, the surviving partners and the new partner covenanted *jointly* to idemnify the executors from the debts and liabilities of the old firm. A suit was afterwards instituted in respect of the breach of trust, and the executors were ordered to make good the same out of the assets of their testator. The executors then filed a bill to be indemnified out of the estate of the new partner, and contended that the covenant into which he had entered, though joint in form, ought to be considered as joint and several. But it was held otherwise, for the obligation of the new partner to indemnify the plaintiffs existed only by virtue of his covenant, and the extent of the obligation could therefore be measured only by the words of such convenant.

Again, in Clarke *v.* Bickers (*h*), a lease was made to two partners jointly, of lands wanted by them for partnership purposes. The demise and lessees' covenants were all joint. After the death of one of the partners his executors were sued in equity in respect of various breaches of covenant, and it was contended that the covenants ought to be treated as joint and several. But it was held on demurrer that no equity arose to the lessor from the fact that the lessees were co-partners; the lessors were *domini factorum*, and determined for themselves how their leases should be granted. The demurrer was consequently allowed. Clarke v. Bickers.

The same doctrine was acted on and even carried further in *Wilmer *v.* Currey.(*i*) In that case three partners dissolved partnership, one of them the plaintiff, retiring. By a deed made between the three partners, the plaintiff assigned all his share and interest in the other two, and they *jointly* covenanted to pay the debts of the firm, and to indemnify the plaintiff therefrom and to pay the plaintiff certain sums of money. One of the two continuing partners having died, and the covenants not having been performed, the plaintiff filed his bill against the surviving partner and the executors of the deceased partner, in order to obtain the sums remaining due to him, and to have the unliquidated partnership debts paid. But it was held on demurrer that the plaintiff had no equity against the estate of the deceased partner; *for although that partner was, irrespectively of the deed, liable to contribute towards payment of the* *373 Wilmer v. Currey.

(*h*) 14 Sim. 639. (*i*) 2 DeG. & Sm. 347.

partnership debts, that was different from the obligation which arose by virtue of the covenant of which the plaintiff sought the benefit. It is, however, difficult to reconcile this case with Beresford *v.* Browning. (*k*)

2. *As regards torts.*

Torts create joint and several liabilities.

For torts imputable to a firm all the partners are liable jointly and severally. (*l*)[1] To this general rule an exception occurs where an action *ex delicto* is brought against several persons in respect of their ownership in land, for then they are liable jointly, and not jointly and severally. (*m*)

Distinction between torts and breaches of contract.

Although for general purposes it may be convenient to distribute acts and forbearances which give rise to obligations under the heads breach of contract and tort, it would not be difficult to show the impossibility of always distinguishing between the two. And yet if a breach of a contract binding on the firm imposes a joint liability only on its living members (as to which see *ante*, p. 369), whilst a tort imputable to the firm imposes a joint and several liability, the importance *374 of being able accurately to *distinguish between a breach of contract and a tort becomes apparent. The difficulty, however, of doing so is increased by the doctrine that there are cases in which the same breach of an obligation may be regarded from two different points of view; and may at the option of the person injured, be made the foundation either of an action *ex contractu* or

(*k*) The Court of Appeal, however, thought the two might be distinguished. See 1 Ch. D. 30.

(*l*) Mitchell *v.* Tarbutt, 5 T. R. 649; 1 Wms. Saund. 291 *f*, and *g*; Com. Dig. Abatement, F. 8.

[1] See Cooley on Torts, 133.

An action on the case for negligence occasioning the loss or destruction of a slave hired by plaintiff to a co-partnership, may be maintained against one of the members of the firm, without joining the other partners. So, if the negligence be that of an agent of the co-partnership. White *v.* Smith, 12 Rich. 595.

Where partners assign property to a creditor as security for the debt, and he intrusts such property to the partners to sell, as his agents, and to pay over the proceeds to him, they do not become liable, upon sale of the property, as tortfeasers, as upon an unauthorized disposal thereof. Their liability rests upon contract, not upon tort, and is necessarily joint, not several. Harris *v.* Schultz, 40 Barb. 315.

(*m*) See 1 Wms. Saund. 291, *f* and *g*.

of an action *ex delicto*. (*n*) Suppose, for example, that property is entrusted to a firm of bankers for the purpose of sale and investment, and that some member of the banking firm misapplies the property so entrusted. This breach of duty is a breach of the contract which was tacitly, if not expressly, entered into by the bankers when they received the property. But the misapplication of the property is a wrong independently of any contract; amounting in effect to a conversion or destruction of that which belonged to the customer. Regarded as a breach of contract, the liability arising therefrom would before the Judicature acts have been joint at law; whilst regarded as a wrong independently of contract, the liability would have been joint and several; and at law the tendency was to consider the wrong as a breach of contract. (*o*) But in equity the wrong imposed a joint and several liability on all the partners; on the ground that each partner was bound to see to the proper application of what was entrusted to the firm. (*p*) In such cases as these, the several liability of each partner to the creditors of the firm is not affected by the circumstance that the act imposing such liability was done by one only of the members of the firm without the knowledge or consent and in fraud of the others. If the act in question imposes a liability which upon the principles of agency can be imputed to the firm, each member thereof is in equity severally liable for such act, just as much as if there had been no fraud in the case (*q*); and it is well established in equity that a breach of trust which is imputable to several *persons, imposes upon them a liability which is both joint and several.(*r*)

Breaches of trust impose joint and several liabilities.

*375 Liability for breach of trust.

How far the Judicature Acts have altered the law on this subject cannot be predicted with any certainty; but probably all breaches of contract which can be regarded as torts or breaches of trust will be held to impose several as well as joint liabilities.

(*n*) See on this subject, Brown *v.* Boorman, 11 Cl. & Fin. 1, and the cases there referred to, and especially Powell *v.* Layton, 2 Bos. & P. N. R. 365; Bretherton *v.* Wood, 2 Brod. & Bing. 54; Pozzi *v.* Shipton, 8 A. & E. 963; Boson *v.* Sandford, 2 Show. 29 and 101. See, also, Pontifex *v.* Midland Railway Co. 3 Q. B. D. 23.

(*o*) See the cases last cited.

(*p*) See Blair *v.* Bromley, 2 Ph. 354; Sadler *v.* Lee, 6 Beav. 324.

(*q*) See Vulliamy *v.* Noble, 3 Mer. 619; Clayton's case, 1 Mer. 576; Ward's case, ib. 624.

(*r*) Devaynes *v.* Noble, Sleech's case, 1 Mer. 563; Baring's case, ib. 614; Sadler *v.* Lee, 6 Beav. 324; Brydges *v.* Branfill, 12 Sim. 369; Blair *v.* Bromley, 2 Ph. 359; Wilson *v.* Moore, 1 M. & K.

Nature of liability of shareholders compared with that of partners.

In order to contrast the nature of the liability of shareholders with that of partners, companies must be divided into those which are incorporated and those which are not, and each class must be again subdivided; for, owing to the diversity of the statutes relating to companies, little is common to them all. The general principles which require to be borne in mind are, first, that unincorporated companies are not at common law distinguishable from partnerships; and secondly that incorporated companies are distinguishable from them, and that the shareholders in such companies are not liable for the corporate debts and engagements save so far as they are rendered so by act of Parliament. If shares in an incorporated company are registered in the names of two persons jointly and one of them dies, the survivor is the only person liable to be made a contributory in respect of them. (*s*)

Joint holders of shares.

SECTION II.—EXTENT OF LIABILITY.

1. *At common law.*

Extent of partners, liability at common law.

By the common law of this country, every member of an ordinary partnership is liable to the utmost farthing of his property for the debts and engagements of the firm. The law, ignoring the firm as anything distinct from the persons composing it, treats the debts and engagements of the firm as the debts and engagements of the partners, and holds each partner *liable for them accordingly.[1] Moreover, if judgment is obtained against the firm for a debt owing by it, the judg-

*376

127 and 337. Compare, however, Parker *v.* McKenna, 10 Ch. 123, and Vyse *v.* Foster, L. R. 7 H. L. 318.

(*s*) Hill's case, 20 Eq. 595.

[1] Nebraska R. R. Co. *v.* Colt, 8 Neb. 251.

In an action to charge several persons as joint partners in a stock speculation, in which plaintiffs were employed as brokers, and in which the defense was that each of the defendants was, by special agreement, liable for his own share only: *Held*, that it was competent for the plaintiffs to show that one of the defendants had a separate stock account with them. Binney *v.* Young, 5 Daly, 327.

In Louisiana commercial partners are bound *in solido* for the debts of the firm, while ordinary partners are liable

ment creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the partners; nor is he under any obligation to levy execution against all the partners rateably; but he may select any one or more of them and levy execution upon him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves. (*t*)

This doctrine of unlimited liability applies by common law not only to ordinary partnerships, but to all unincorporated companies without exception (*u*)[2]; but not to incor- Extent of shareholder's liability.

only in respect of their shares. See, Villa *v.* Jones, 17 La. An. 9; Moores *v.* Bates, 13 id. 40; a partnership in a contract for the building of railroads; Beauregard *v.* Case, 91 U. S. 134.

But to the extent of their shares of the partnership debts, a debt contracted by an ordinary partner, even without authority of the others, binds them, if it be proved that the partnership was benefited by the transaction. Beauregard *v.* Case, 91 U. S. 134; Logan *v.* Cragin, 27 La. Ann. 352; Lallande *v.* McRae, 16 Id. 193.

Each is bound in proportion to the number of partners, without any attention to the proportion of the stock or profits each is entitled to. But where the recourse of the creditor is had, on account of the benefit conferred upon the partnership by a contract not its own, the rule is different, and each partner's share is to be fixed in proportion to the interest which he has in the concern, and to the benefit which he has in consequence derived. Lallande *v.* McRae, *supra*.

Where the evidence shows that the two individual signers of a merely joint note were, at the date of the note, commercial partners, and that the consideration of the note was money borrowed for, and used by the partnership, each of the makers will be liable on the note *in solido*. Mitchell *v.* Darmond, 30 La. An. 396.

A law partnership is an ordinary one, and the partners are bound jointly and not *in solido*. Dyer *v.* Drew, 14 La. Ann. 657; Jones *v.* Caperton, 15 Id. 475.

Where a suit is brought against persons bound jointly and severally according to law, as commercial partners, a judgment rendered against them carries solidarity with it, even when not expressed in it. Bell *v.* Massey, 14 La. Ann. 881.

Planting partners are bound jointly, each for one-half of a debt contracted by them for the benefit of the partnership. Dupre *v.* Body, 23 La. Ann. 495.

When there is a prayer in the petition for general relief, and the partnership sued is alleged to be a commercial one, a judgment rendered against the parties *in solido* will not be disturbed on the ground that a joint judgment was claimed in the petition. Taylor *v.* Hancock, 14 La. Ann. 693.

The liability of a partner to a third person is not increased by the fact that an individual debt of his has been assumed by the partnership of which he is a member. Bogereau *v.* Guéringer, 14 La. Ann. 478.

(*t*) See *per* De Grey, C. J., in Abbott *v.* Smith, 2 Wm. Blacks. 949, and Wooley *v.* Kelley, 1 B. & C. 68; Com. Dig. Execution, H.

(*u*) See Keasley *v.* Codd, 2 Car. & P. 408 *n*; Carlen *v.* Drury, 1 V. & B. 157; R. *v.* Dodd, 9 East, 516; Robinson's Executor's case, 6 DeG. M. & G. 572.

[2] See *ante* pp. 4, 5, note.

porated companies. The doctrine in question, however, has been extended by statute to all companies incorporated by mere registration, with the exception of those expressly registered with limited liability.

Attempts to limit liability.

Omitting for the present all reference to statutes, it is proposed to notice the attempts which from time to time have been made with more or less success to form partnerships, in which the liability of the members should be less extensive than it would be under ordinary circumstances. These attempts may be ranged under two heads, according as there has or has not been some special agreement with the creditors.

Without special contract with creditors.

So inflexible is the doctrine of unlimited liability, and so important is it that no doubts shall be cast upon it, that judges have frequently denounced in the strongest terms the conduct of those who have endeavored to inveigle the public into taking shares in concerns by asserting that "no one shall be liable beyond the amount of his subscription." Nothing can be more delusive or worthless than such statements as applied to unincorporated bodies; for although the subscribers themselves may stipulate with each other for such a restricted liability, nothing is more clear than that, as to the rest of the world, each partner is liable for the whole amount of the debts of *377 the partnership. (x) Nor will notice that a stipulation of *this kind has been entered into between the partners prevent a creditor from holding each of them liable to the full extent of his demand. (y)

By special contract with creditors.

Notwithstanding, however, this general rule by which each partner is liable for all the debts and engagements of the firm, it is competent for any one dealing with the firm to contract not to hold the partners liable to an unlimited extent.

The stockholders of a corporation do not become liable as partners, on notes given by the treasurer of the corporation, merely because, after organizing under the act of incorporation, no corporate business is transacted, or because the notes were given for debts beyond the corporate authority of the company. Trowbridge *v.* Scudder. 11 Cush. 83.

Under the statute making the stockholders of an incorporated association, at the time of its dissolution, liable for the debts due from the company to the amount of their stock, the stockholders will be bound to pay a debt which was binding upon the company. Slee *v.* Bloom, 20 Johns. 669.

(x) R. *v.* Dodd, 9 East, 516.

(y) See Greenwood's case, 3 DeG. M. & G. 459. The State Fire Ins. Co. Meredith's case, and Conver's case, 1 N. R. 510, V.-C. W. *ante*, p. 333.

For example, if one person induces another to enter into partnership upon the assurance that he shall not be liable to the former for any of the debts of the firm, this will have the effect of limiting the liability of the partner in question to those debts of the firm which are not owing to the person who induced him to become a partner. (*z*) Again, if a person chooses to deal with a partnership or company upon the terms that its funds, and they only, shall be available to make good his demands, he cannot afterwards depart from those terms and hold the members individually liable as if no such restriction had been agreed to. (*a*)

It is, however, to be borne in mind, that partners who contend for restricted liability, have the *onus probandi* on themselves, and if, owing to any circumstance, they fail in establishing their contention, the general rule of unlimited liability applies to them as a matter of course. (*b*)

Limiting liability to funds of company.

The ordinary mode of restricting liability, is to contract that the funds of the company shall alone be liable to the demands against it. Upon contracts in this form, it is to be observed that—

1. A contract by a person to pay out of his own property without limitation, is in fact an absolute contract to pay; for *expressio eorum quæ tacite insunt nihil operatur.*

2. Upon the same principle, a contract by a corporation to *pay out of its funds generally is, as regards the corporation, neither more nor less than a contract to pay absolutely; for a corporation as such has nothing except its funds to pay out of. (*c*) *378

3. An express contract to pay out of certain funds, excludes an implied contract to pay in some other manner. (*d*)

(*z*) See Batty *v.* M'Cundie, 3 Car. & P. 208; Cannop *v.* Levy, 11 Q. B. 769. Compare Bill *v.* Richards, 2 H. & N. 311; and see as to the fraud of the plaintiff in getting up a company, Pilbrow *v.* Pilbrow's Atmospheric Co. 5 C. B. 440.

(*a*) Alchorne *v.* Saville, 6 Moo. 202; Halket *v.* The Merchant Trader's Loan Assoc. 13 Q. B. 960; Hallett *v.* Dowdall, 18 Q. B. 2 (the judgment on the bill of exceptions); Durham's case, 4 K. & J. 517.

(*b*) See Luckombe *v.* Ashton, 2 Fos. & Fin. 705, and *ante*, note. (*y*)

(*c*) Sunderland Marine Insur. Co. *v.* Kearney, 16 Q. B. 925, in which the liability of the individual members of the company was not in question.

(*d*) See Alexander *v.* Worman, 6 H. & N. 100; Giles *v.* Smith, 11 Jur. 334, C. P.; Landman *v.* Entwistle, 7 Ex. 632; Mathew *v.* Blackmore, 1 H. & N. 762; Taft *v.* Harrison, 10 Ha. 489. Compare Cope's case, 1 Sim. N. S. 54.

4. But a person who undertakes to pay out of certain funds, is absolutely bound to pay if those funds exist and are available; so that if, the funds existing and being available, he does not choose to pay out of them, he must pay out of his own property. (*e*)

5. On the other hand, a person who undertakes to pay out of certain funds, is under no obligation to pay unless those funds exist (*f*), or unless their non-existence is owing to his own default (*g*), or unless he has also undertaken that they shall exist; in which last case his undertaking to pay amounts to an absolute undertaking, and the qualification as to the funds goes for nothing. (*h*)

Success of attempt so to limit liability.

In conformity with these principles, it has been held that the promoters of a company are not liable to persons employed by them upon the terms that such persons shall look for payment to certain specified funds, and not to the promoters individually (*i*); that upon a contract to pay out of the *379 funds of a *joint-stock company, all those who in point of law are bound by the contract, are personally liable to satisfy the demands to which those funds are applicable, if any such funds there be (*k*); but that if there are no such funds, then the event on which alone payment has to be made not having arisen, no one is liable to pay. (*l*)

(*e*) Higgins *v.* Hopkins, 3 Ex. 163; Hallett *v.* Dowdall, 18 Q. B. 2. But if an incorporated company promises to pay out of its funds only, and it has funds, it does not follow that the shareholders are personally liable, *Re* the Athenæum Society, and Prince of Wales Society, Johns. 80, affirmed 3 DeG. & J. 660.

(*f*) The Statute of Limitations does not begin to run until they do exist. See Kensington Station act, 20 Eq. 197.

(*g*) As in McIntyre *v.* Belcher, 14 C. B. N. S. 654, where the defendant discontinued the business, out of the profits of which he was to pay the plaintiff. See, also, Telegraph Dispatch Co. *v.* McLean, 8 Ch. 658; Worthington *v.* Sudlow, 2 B. & Sm. 508. Compare King *v.* Accumulative Ass. Co. 3 C. B. N. S. 151, and Rhodes *v.* Forwood, 1 App. Ca. 256, noticed *infra*, p. 380, note (*r*).

(*h*) See Pilbrow *v.* Pilbrow's Atmospheric Co. 5 C. B. 440.

(*i*) Giles *v.* Smith, 11 Jur. 334, C. P.; Landman *v.* Entwistle, 7 Ex. 632. Compare Cope's case, 1 Sim. N. S. 54; Cullen *v.* Duke of Queensborough, 1 Bro. C. C. 101, and Horseley *v.* Bell, ib. in the note; S. C. 2 Am. 770.

(*k*) See Andrews *v.* Ellison, 6 B. Moore, 199; Gurney *v.* Rawlins, 2 M. & W. 87; Dawson *v.* Wrench, 3 Ex. 359; Reid *v.* Allan, 4 Ex. 326; Hallett *v.* Dowdall, 18 Q. B. 2, the judgment on demurrer.

(*l*) See, in addition to the above cases, Durham's case, 4 K. & J. 517; Halket *v.* The Merchant Traders' Loan and Insurance Association, 13 Q. B. 960; Hassell *v.* Ditto, 4 Ex. 525; The Worcester

The latter proposition, however, supposes that the contract is not so framed as (notwithstanding what is said about the funds of the company) to amount to an undertaking to pay at all events. The importance of attending to this point appears from Hancock *v.* Hodgson. (*m*) In that case, the projectors of a mining company purchased a copper and tin mine, and covenanted to pay the purchase money by quarterly installments out of the funds of the company; but it was provided that in case there should not have been received by the bankers of the company, or by the directors for the time being, the deposits or installments due from the several shareholders, so as to enable the directors to pay the purchase money at the times therein before mentioned, then and in such case the said directors shall be allowed a further time to pay such balance, until six months after the time or times when the said quarterly instalments became due. Upon this covenant and proviso, it was held that the covenantors were personally liable to pay the whole purchase moneys, although the company had no funds; for that whatever might have been the case without the proviso, that clearly showed that after the expiration of the further period therein mentioned, the payment was to be made by the covenantors at all events, whether the company had funds or not.

Failure of attempt where contract is not clear.

Hancock *v.* Hodgson.

* Having made the above general observations, it is necessary to examine with greater particularity the effect of contracts by companies to pay out of particular funds, on *380

1. The rights of creditors against the funds themselves; and 2. Their rights against the members individually where those funds have been exhausted.

1. With respect to the rights of creditors against the funds, it may now be considered as settled, that a contract by a company to pay a person out of its funds does not give the creditor any specific charge or lien on those funds, nor any preference over other creditors (*n*); but it nevertheless entitles him, even before the time for payment arrives, to prevent the funds from being misapplied. (*o*) Where, therefore, an insurance company had

Right against the funds.

Corn Exchange Co. 3 DeG. M. & G. 180; King *v.* The Accumulative Assurance Co. 3 C. B. N. S. 151; and compare Cope's case, 1 Sm. N. S. 54.

(*m*) 4 Bing. 269.

(*n*) Albert Life Ass. Co. 9 Eq. 706; McIver's claim, 5 Ch. 424, and the cases in the next note.

(*o*) See Kearns *v.* Leaf, 1 Hem. & M. 681; The State Fire Insur. Co. ib. 457,

issued policies, and made them payable out of its funds, a policy holder whose policy had not become payable was held entitled to an injunction to restrain the company from amalgamating with and transferring its funds to another company, such amalgamation and transfer not being warranted by the deed of settlement of the first company. (*p*) It has, however, been held (*q*) that a contract to pay a policy out of particular funds does not amount to a contract to carry on business, nor to a contract not to hand over the funds to other persons (*r*); and that a policy holder whose policy is not due cannot support an action for damages which he fears he will sustain, but which possibly he will not. The last ground is perhaps the most satisfactory, and has the advantage of rendering the decision in equity consistent with that at law

*381 *It is, however, by no means uncommon for an insurance company to limit its liability to policy holders and annuitants to its fund, and to have in its deed of settlement or articles of association power to transfer its funds and its business to another company. Where this occurs, a transfer of the funds cannot be prevented by a policy holder or annuitant; and upon a proper transfer being made, pursuant to the power in the deed of settlement or articles of association, the policy holders and annuitants cease to have any claims against the transferring company. (*s*)

Where the company has power to transfer its funds.

2. With respect to the extent of the liability of the members of a company upon contracts in which it is specially stipulated that the funds of the company alone shall be answerable, and that no member shall be liable beyond the amount of his share, the limit set by contract is the limit of liability:—

Extent of members' liability.

and 1 DeG. J. & Sm. 634; Athenæum Life Insurance Society, Johns. 80 & 633, and 3 DeG. & J. 660; Law *v.* London Indisputable Life Policy Co. 1 K. & J. 223. These cases will be adverted to hereafter, when the winding up of companies is being considered.

(*p*) Kearns *v.* Leaf, 1 Hem. & M. 681; Aldebert *v.* Leaf, ib.

(*q*) King *v.* Accumulative Life Assur. Co. 3 C. B. N. S. 151. See, also, Lethbridge *v.* Adams, 13 Eq. 547.

(*r*) See, also, Rhodes *v.* Forwood, 1 App. Ca. 256, where an agent of a colliery contended in vain that his employer was bound to carry it on. Compare Telegraph Despatch Co. *v.* McLean, 8 Ch. 658, and McIntyre *v.* Belcher, 14 C. B. N. S. 654, noticed *ante*, p. 378, note. (*g*)

(*s*) See, as to policy holders, Hort's case, 1 Ch. D. 307; Grain's case, ib.; Harman's case, ib. 326; Cocker's case, 3 Ch. D. 1; and as to annuitants, Dowse's case, ib. 384.

Where the company is an incorporated company, there never was any difficulty in giving effect even at law to all the terms of the contract; and in the case of companies registered under the act 7 & 8 Vict. c. 110, it was held that the members were not liable to have execution issued against them upon judgments obtained against the company on a contract of the description in question; but that the property of the company was alone liable to make good the demands of the judgment creditor; and this was held at law even in cases where the subscribed capital had been exhausted, but the whole capital had not been paid up. (*t*)

(a) Where the company is incorporated.

The same principle was acted on in equity, except that a Court of equity compelled the shareholders to pay up rateably so much of the capital as had not already been subscribed. (*u*) This can now be done by a properly constituted action.

In all these cases, however, it must be borne in mind that *the liabilities which are limited to the funds of the company, are those only which are expressly so limited by the contracts with the creditors; the liabilities to other persons are unlimited. (*x*) *382

Companies governed by the Companies act, 1862, may, although unlimited, limit their liability by special contract (*y*), and where they do so the principles above adverted to will be applicable. But as under the Companies act, 1862, judgments against a company cannot be enforced against its members, questions as to their individual liability can scarcely arise except when a company is being wound up.

Companies governed by the act of 1862.

As regards unincorporated companies, it was extremely difficult, if not impossible, before the passing of the Judicature Acts, to enforce by action at law a contract limiting their liability to their funds. (*z*)

(b) Where the company is not incorporated.

(*t*) Halket *v.* The Merchant Traders' Loan and Insurance Assoc. 13 Q. B. 960; Hassell *v.* The Same, 4 Ex. 525; Durham's case, 4 K. & J. 517; *Re* the Athenæum Life Soc. Johns. 80, and 3 DeG. & J. 660, on appeal; Lethbridge *v.* Adams, 13 Eq. 547.

(*u*) Talbot's case. 5 DeG. & Sm. 386; Durham's case, 4 K. & J. 517; Evans *v.* Coventry, 8 DeG. M. & G. 835. See clause 7 of the decree.

(*x*) See the Albert Life Ass. Co. 9 Eq. 706; Professional Life Ass. Co. 3 Eq. 668, and 3 Ch. 167; Lethbridge *v.* Adams, 13 Eq. 547.

(*y*) See § 38, cl. 6.

(*z*) See Hallett *v.* Dowdall, 18 Q. B. 2, and the observations of Mellish, L. J. in Hort's case, 1 Ch. D. 322; Alchorne *v.* Saville, 6 B. Moore, 202, note. Hallett *v.* Dowdall was noticed at length in the earlier editions of this treatise, but

It was practically necessary to sue in equity. But now it is apprehended that an action could be maintained against the persons having the control of the funds and the persons liable to contribute to them, to enforce the liability to contribute, and the due application of the funds when raised. (*a*)

2. *By statute.*

Limited liability by statute.

Passing now to the subject of limited liability by statute, the first point which has to be borne in mind is that the moment a society of any kind is incorporated, its members cease by common law to be in any way liable for the debts and engagements of the body corporate. Moreover, although by common law it has always been lawful for the Crown to create *383 *corporations, the Crown has no power by common law to create a corporation and at the same time to render its members individually liable for its debts. (*b*) The whole of that branch of the law of partnership which relates to the liability, as distinguished from the non-liability, of the members of incorporated companies for the debts and engagements of such companies, is of modern growth and is based upon statutory enactments.[1] These

it has not been thought necessary to reproduce the former observations on it.

(*a*) See Law *v.* The London Indisputable Life Policy Co. 1 K. & J. 223; Talbot's case, 5 DeG. & Sm. 386; Durham's case, 4 K. & J. 517; Robson *v.* McCreight, 25 Beav. 272; Evans *v.* Coventry, 8 DeG. M. & G. 835. See, as to the effect of a transfer by the company of its business, Hort's case, 1 Ch. D. 307.

(*b*) This power was conferred upon the Crown by 6 Geo. 4, c. 91, § 2, which was followed by 4 & 5 Will. 4, c. 94, and was with it repealed and replaced by 7 Will. 4 & 1 Vict. c. 73.

[1] The cases upon the subject of Limited Partnership, which exists by statute in most of the United States, may properly be considered in this connection. The first statute upon the subject in this country was enacted in the State of New York and was substantially copied from the French Code of Commerce. See 3 Kent Com. 35. The statute of New York, in turn, has served as the basis of the statutes upon the subject in the other States. See the nature, origin and history of limited partnerships examined at length by the court in Ames *v.* Downing, 1 Bradf. 321; Joacquin *v.* Buisson, 11 How. Pr. 385.

No partnership attempted to be formed under these statutes with a limited liability of some of the partners is limited, but all the partners are liable as general partners, unless the statutes upon the subject are strictly, or as some cases say, substantially complied with. Richardson *v.* Hogg, 38 Penn. St. 153; Pierce v. Bryant, 5 Allen, 91; Haviland *v.* Chace, 39 Barb. 283; Holliday Union B. & P. Co. 3 Colo. 342; Vandike *v.* Rossbram, 67 Penn. St. 330;

enactments will be examined hereafter in connection with the subjects of execution and winding up, but it may be useful to state generally in the present place that—

Henkel *v.* Heyman, 91 Ill. 96; Pfirman *v.* Henkel, 1 Bradw. 146; Bowen *v.* Argall, 24 Wend. 496; Smith *v.* Argall, 6 Hill. 479; 3 Den. 435; Andrews *v.* Schott, 10 Penn. St. 47; Van Ingen *v.* Whitman, 62 N. Y. 513; Madison County Bank *v.* Gould, 5 Hill. 309.

The statute of Illinois requires the certificate, acknowledgment and affidavit to be filed and left in the office of the clerk of the county court, and not merely left temporarily for record and then withdrawn. If taken away voluntarily on the neglect of the clerk to record the same, no limited partnership will be formed. And even if the object of filing such papers was temporary for the purpose of being recorded, if they are voluntarily taken away before being recorded, the neglect to file and record being attributable to the clerk, and the partners knowing such fact, no limited partnership will be created. Henkel *v.* Heyman, 91 Ill. 96; Pfirman *v.* Henkel, 1 Bradw. 145.

M. entered a firm upon the understanding that he was to be a special partner, with limited liability. He paid a specified sum toward the capital stock, upon which he was to receive legal interest and one-fourth of the profits. The statute in relation to limited partnerships, was not complied with, but M.'s name did not appear in the firm, and he took no part in the management of the business. M. was induced to enter the firm by the fraudulent representations of his partners, and withdrew as soon as he discovered the fraud: *Held*, that M. was a general partner, and as such was liable for the contracts of the firm while he so remained. Tournade *v.* Hagedorn, 5 Thomp. & C. 288; Tournade *v.* Methfessel, 3 Hun, 144.

Where the certificate of the formation of a limited partnership described the general partners as of "B," and the special partner as "of J C:" *Held*, that this was a sufficient statement of the residences of the parties under the statute. Lachaise *v.* Marks, 4 E. D. Smith, 610.

The statute authorizing the creation of limited partnerships (1 Rev. Stat. N. Y.. 764, as amended by Laws 1862, ch. 476), does not require that the certificate provided for the act should be filed cotemporaneously with its execution or with the formation of the partnership, in order to make the partnership a limited one as to those parties whose claims against the partnership accrue after the certificate is actually filed. Levy *v.* Lock, 5 Daly, 46; S. C. 47 How. Pr. 394.

An unrecorded certificate of a limited partnership agreement, executed under New York laws, has no tendency to prove a general partnership, or any kind of partnership whatsoever, without evidence *aliunde*. Gray *v.* Gibson, 6 Mich. 300.

A special partnership will, in New York, become a general partnership, and the special partners liable as general partners if the place of business is removed from the county in which it was established, without filing a new certificate in the clerk's office of the county to which it has been removed. Riper *v.* Poppenhausen, 43 N. Y. 68.

So, if after the expiration of the time limited for the duration of the limited partnership, it is desired to renew the limited partnership, there must be a new certificate, publication, etc.; and if this is omitted, the partnership will become a general one. Andrews *v.* Schott, 10 Penn. St. 53; Lachaise *v.* Marks, 4; E. D. Smith, 620.

1. The liability of the members of a company governed by the Letters Patent act depends on the terms of its charter or letters patent, the Crown being empowered by the act in question to limit their liability or not. (See 7 Wm. 4 & 1 Vict. c. 73, §§ 4 & 29.)

Chartered companies.

See, also, Beers *v.* Reynolds, 12 Barb. 288; S. C. 11 N. Y. 97.

Where a limited partnership fails to record in the manner prescribed by acts of the assembly an agreement for a renewal of the partnership, the liability of the special partner becomes general. Guillon *v.* Peterson, 7 Wkly. Notes of Cases, 268.

A certificate filed with intent to create a limited partnership, which states that the intending special partner has contributed a certain sum in cash and certain value in goods, is not a compliance with 1 Rev. Stat. N. Y. 764, § 2, authorizing limited partnerships to be formed with special partners, who "shall contribute in actual cash payments" a specific sum. Such certificate does not constitute a limited partnership, but the parties are general partners. *In re* Merrill, 12 Blatchf. 221; Van Ingen *v.* Whitman, 62 N. Y. 513. See *infra*.

An affidavit to accompany a certificate of a limited partnership need not follow the exact words of the statute. If it clearly establishes the facts required by the statute, it is sufficient. And where the affidavit refers to the certificate, it may explained by the statements of the certificate. Johnson *v.* McDonald, 2 Abb. Pr. 290.

Thus, a statement in an affidavit that the special partner has actually paid in "his proportion of the capital, is equivalent to stating that he has paid it in cash. Johnson *v.* McDonald, *Sup.*

If the matters which the statute requires to be contained in the certificate, and affidavit to be made and filed in order to create a limited partnership are stated therein untruly, such a partnership is not formed, and he who sought to confine his liability to that of a special, will become liable as a general partner. Durant *v.* Abendroth. 41 N. Y. Superior Ct. 53; Maginn *v.* Lawrence, 13 Jones & Sp. 235.

In an action where a special partner is sought to be held liable under the provision of the statute, the affidavit and other papers required by the statute, are presumptive evidence of the formation of a limited partnership; but, after evidence has been given tending to falsify the affidavit, it cannot operate as rebutting proof, Van Ingen *v.* Whitman, 62 N. Y. 513.

To bring the special partner within the provisions of the statute of New York, (§ 8), making all liable as general partners in case of any false statement in the affidavit required to be made and filed (§ 7), it is not necessary that the statement be intentionally false. The object of the statute is to give reasonable security to those likely to deal with the co-partnership, and this is thwarted by an unintentional, as well as by an intentional untruth. Van Ingen *v.* Whitman, *Supra.*

Where the statute requires the special partners' capital to be paid in cash, if the affidavit that the special partners have paid in cash their amount of the capital is false, they will become liable as general partners. Haviland *v.* Chace, 39 Barb. 283.

A special partner's payment in whole or in part of his amount of the capital, in goods, is not a compliance with the statute requiring such payment to be in cash. Haviland *v.* Chace, 39 Barb. 283. Richardson *v.* Hogg, 38 Penn. St. 153;

2. The liability of the members of a company governed by the Companies clauses consolidation act is limited to the extent of their unpaid-up shares in the capital of the company (8 & 9 Vict. c. 16, § 36).

Companies governed by 8 & 9 Vict. c. 16.

Re Merrill, 12 Blatchf. 221; S. C. 13 Nat. Bank. Reg. 91.

Nor is a delivery to the firm of promissory notes which are received and treated as cash, such payment. Pierce *v.* Bryant, 5 Allen, 91.

The words "an actual cash payment as capital" by a special partner, in Mass. Gen. Stat. Ch. 55, § 2, to exempt him from liability for the firm debts, does not apply to his merely authorizing the firm, at a future time, to use United States bonds by him deposited in a bank, without notice to the bank of such authority, even after the recording of the certificate required by section 3, and such appropriation of the bonds. Haggerty *v.* Foster, 103 Mass. 17.

Giving post-dated checks for the special partner's share of the capital, does not warrant the affidavit required by the statute, that the sum has been paid in cash, but the special partner is liable as general partner. So, although the checks were promptly paid at the outset of the firm business. Durant *v.* Abendroth, 69 N. Y. 148; S. C. 41 N. Y. Superior Ct. 53.

So, the uncertified checks of the special partners upon a bank, in which, at the date of the checks, they have not money sufficient to meet and pay their checks, cannot be deemed cash, although before the checks were presented, they had arranged or provided funds to pay the same and they were paid. Maguire *v.* Lawrence, 13 Jones & Sp. 235.

It is not a sufficient payment when a part of the sum to be contributed by the special partner has been paid by another person, with the intention of securing the advantages of a special partner without becoming one. Bulkley *v.* Marks, 15 Abb. Pr. 454.

No matter how the special partner has acquired the money he contributes, if it is his property, and he pays it in under the forms prescribed by the statute, and leaves it absolutely to the risks of the business, the law requiring it to be paid in good faith in cash is satisfied. Laurence *v.* Merrifield, 42 N. Y. Superior Ct. 36.

In Colorado the statute does not require that the capital should be paid in cash, but when it is paid in property it should be so stated, and its cash value given. Holliday *v.* Union B. & P. Co. 3 Colo. 342.

Conn. Gen. Stat. tit. 49, § 8,—relating to limited partnerships, and providing that all advancements to the capital stock by special partners shall be in cash, and shall not be withdrawn during the period of the partnership, "nor shall any special partner," etc., "be considered a creditor, or allowed to claim as a creditor in case of the insolvency or bankruptcy of the partnership,"—relates to funds furnished by the special partner as capital stock; and not to independent debts contracted with him as an individual in good faith and in the course of business. Capp *v.* Lacey, 35 Conn. 463.

Where a partnership was formed between B and C, wherein it was stipulated that the partnership should be special; that C should be the special partner, and should contribute a certain sum "as capital to the common stock for carrying on the business," which was to be conducted in the name of B & Co.; and the sum was paid in, and invested in goods, and the goods were sold and other goods purchased in their place with the proceeds of their sales: *Held*, that whether the partnership was

3. The liability of the members of a company empowered by a special act of Parliament to sue and be sued by a public officer depends on the terms of such act, but will almost invariably be found to be unlimited. (*c*)

Companies empowered to sue and be sued.

4. The liability of the members of a banking company governed by 7 Geo. 4, c. 46, is unlimited. (See 7 Geo. 4, c. 46, §§ 11, 12, 13.)

Banking companies governed by 7 Geo. 4, c. 46.

special or general, the goods became firm property, the firm becoming debtor to the partner advancing the capital to the amount advanced. Bradbury *v.* Smith, 21 Me. 117.

Under the provisions of the Pennsylvania Limited Partnership Act of 1836, where the general partner misappropriates the contribution of a special partner, the latter is not liable as a general partner for the debts of the partnership, where he is not privy to the misappropriations. Seibert *v.* Bakewell, 87 Pa. St. 506.

A limited partnership was formed between three, one as special partner. The certificate was published and sworn to by one of the general partners, the amount contributed by the special partner being therein set forth, and stated to have been paid in. The firm soon became insolvent, and the general partners made an assignment to the plaintiffs in trust for the benefit of all the firm creditors. The plaintiffs brought their bill in equity to compel the special partner to pay in the amount of his capital, to be used in the payment of partnership debts, and the bill was sustained. Robinson *v.* McIntosh, 3 E. D. Smith, 221.

If a special partner withdraws his capital in part, upon the subsequent insolvency of the firm, he is liable to creditors for such amount and interest. La Chomette *v.* Thomas, 1 La. Ann. 120; Bulkley *v.* Marks, 15 Abb. Pr. 454. See, also, Beers *v.* Reynolds, 12 Barb. 238; S. C. 11 N. Y. 97; Lachaise v. Marks, 4 E. D. Smith, 610.

Where no time is stipulated in the contract of partnership, for the payment of the amount to be contributed by a partner *in commendam*, the latter will be responsible to the creditors of the partnership, for interest on the amount unpaid, from judicial demand only. De Lizardi *v.* Gossett, 1 La. Ann. 138.

Arguendo, the court say that the withdrawal by a special partner of a part of the capital which he had contributed, and, together with the general partners purchasing with it real estate, and taking a conveyance of it to all the partners, general and special, is in violation of the statute, the consequence of which is that the special partner shall be deemed as general partner. Ward *v.* Newell, 42 Barb. 485.

Where a special partnership was formed under the statute, and in the advertisements in one of the two newspapers required by the statute, the sum contributed by the special partner was, by mistake of the printer, stated at $5000 instead of $2000, which latter was the true sum; the partners were all *held* liable as general partners. Argal *v.* Smith, 3 Den. 435; S. C. 6 Hill, 479.

(*c*) See Aldridge *v.* Cato, L. R. 4 P. C. 313 as to the liability of a member of a company empowered to sue and be sued, but not incorporated. The Colonial ordinance in that case was held not to have incorporated the company, and the case may be usefully referred to on the construction of such documents.

5. Subject to the exceptions presently to be noticed, the extent of the liability of the members of a company formed and registered under the Companies act, 1862, depends upon whether the company is registered with limited liability or

Companies act, 1862.

In an action to charge special partners as indorsers, it appeared that the published notice stated that the partnership would commence Nov. 16, 1837, whereas the certificate filed stated Oct. 16, 1837: *Held*, that unless the error of the publication was designed to deceive, or the indorsement made before Nov. 16, 1837, the special partners were not liable. Madison Bank *v.* Gould, 5 Hill, 309.

A publication of the terms of a limited partnership within three days after the registry thereof, is a compliance with the statute. Bowen *v.* Argall, 24 Wend. 496.

Where any alteration is made in the capital or shares of a limited partnership and the partnership is carried on, in any way, before the notice has been published four weeks, the special partner incurs all the liability of a general parrtne. Beers *v.* Reynolds, 11 N. Y. 97: 12 Barb. 288.

Where there is an agreement for a special partnership between members of a firm, but the statute on the subject has not been substantially complied with, the knowledge, by creditors, of the existence of the special partnership agreement, at the time the contracts were made, does not discharge the special partner from his general liability; and an allegation, in an affidavit of defense, of such knowledge in the creditors, and that they trusted to the credit of the firm and of the general partners, and not to the special partner, does not amount to an averment of a special contract which will discharge the special partner from a general liability to such creditors. Andrews *v.* Schott, 10 Pa. St. 47.

See, however, Hastings *v.* Hopkinson, 28 Vt. 108; Ensign *v.* Wands, 1 John. Cas. 171.

Special partners are general partners, except as to those points wherein their liability is expressly limited by the statute. Hayes *v.* Bement, 3 Sandf. 397; Lochaise *v.* Marks, 4 E. D. Smith, 610. See, also, Hog *v.* Ellis, 8 How. Pr. 473.

A statute respecting limited partnerships does not apply to a partnership which is general, so far as the liabilities of the partners to third persons were concerned, and limited only in respect to the nature and scope of the business to be carried on. Taylor *v.* Webster, 39 N. J. L. 102. See, also, Jackson *v.* Alexander, 8 Tex. 109.

A special partner in a firm in Cuba, who has complied with the laws of Spain relating to special partnerships, so far as to protect himself from partnership liability in Cuba, is exempt from liability, as a general partner, in transactions of the firm in Cuba, with citizens of the State of New York. The transaction is governed by the laws of Spain. King *v.* Sarria, 14 N. Y. Supreme Ct. 167; S. C. 69 N. Y. 24.

Where goods were ordered from New York for a firm in Cuba, partly by letter and partly by a general partner personally in New York: *Held*, that the contract must be considered as made in New York; but the special partner remaining in Cuba, his authority to bind the firm depended upon the laws of Cuba. Barrows *v.* Downs, 9 R. I. 146.

See, also, King *v.* Sawin, 14 N. Y. S. C. 167.

The same principle of law that protects a general partnership against liability upon contracts by individual

not. If the company is registered with limited liability, its members are not liable beyond the amount for which they have
*384 *undertaken to be responsible; but if the company is not so registered, its members are liable to the full amount of the company's debts and engagements, whatever that may be. (*d*) The liability, however, of each member is merely a liability to contrib-

partners, out of the scope of the partnership business, protects the capital of special partners in a limited partnership against liability upon like contracts by general partners. Taylor *v.* Rasch, 11 Bankr. Reg. 91.

All persons dealing with a limited partnership are chargeable with the notice of the scope of the partnership business, as specified in the articles of co-partnership, when the articles have been duly filed and published as required by law. Taylor *v.* Rasch, *Supra.*

No departure by general partners, no matter how common or long continued, if not consented to, or known and acquiesced in by the special partners, can have the effect to change or enlarge the scope of the partnership business, as specified in the articles of copartnership. Taylor *v.* Rasch, *Supra.*

A, B and C were in partnership. C, who was a special partner, by a failure to comply with the law regulating limited partnerships, became a general partner as to the public, but remained a special one as to his partners. B, who was the executor of an estate, loaned certain of its securities to the firm, and they were converted to the firm's use. There was evidence that C knew of at least one loan made by B to the firm: *Held*, that although there was no evidence to show that C participated in or knew of the fraudulent conversion, he was liable as a general partner to the estate. Guillore *v.* Peterson, 89 Pa. St. 163.

When one partner in a limited partnership, affixes the name of the firm to a promissory note during the existence of the partnership, the partners are *prima facie* liable thereon; and if any member thereof seeks to avoid his liability, the burden of proof lies upon him to make out his defense. Jenisen *v.* Dearing, 41 Ala. 283; Holmes *v.* Porter, 39 Me. 157.

If one, carrying on a limited partnership in his individual name, borrow money, representing it to be for the use of the partnership, the dormant partners are liable without proof that the money went to the use of the partnership. Otherwise, if he borrow without such representation. Etheridge *v.* Binney, 9 Pick. 272.

To charge a limited partnership with the payment of articles not within the scope of the business of the firm, it must be proved that they were furnished for the benefit of the firm, or that they assented to the purchase. Goode *v.* Linecum, 2 Miss. 281.

Where one who has given credit to a partnership which he believes to be a limited partnership, and which is known to the public as such, afterwards seeks to charge all the partners as general partners, the burden of proof is upon him to show a general partnership. Whilldin *v.* Bullock, 4 Wkly. Notes of Cas. 234.

In Darrow *v.* Bruff, 36 How. Pr. 479, it was held that a general assignment for the benefit of creditors, of a limited partnership, executed and acknowledged

(*d*) See 25 & 26 Vict. c. 89, § 38.

ute with others; and such liability can only be enforced by winding up the company. No execution can issue against a member upon a judgment obtained against the company.

The exceptions above referred to are as follows:— Exceptional liabilities.

(1.) Even if the company is registered with limited liability, the liability of the directors will be unlimited if the memorandum of association so provides. (*e*)

by the resident partner in person, for himself, for the firm, and as the attorney in fact of the non-resident partners, is sufficiently executed. Non-resident members of a firm are not necessarily included in the statutory requirement of a personal execution and acknowledgment by each of the assignors. Darrow *v.* Bruff, 36 How. Pr. 479.

In Singer *v.* Kelly, 44 Penn. St. 145, it was held that the special partner cannot be affected by any assignments of the assets of the firm, if he has not assented thereto; and where there is no offer to prove that assent, but only that the general partners had made them, it is properly rejected. Singer *v.* Kelly, 44 Pa. St. 145.

A special partner will be held liable as a general partner, for purchases made under his representations that such is his interest. Barrows *v.* Downs, 9 R. I. 146.

So, if his name is used in contracting with his consent. Madison County Bank *v.* Gould, 5 Hill, 309; Jonan *v.* Blanchard, 2 Rob. (La.) 513.

If a special partner buys out the entire firm property during the existence of a limited partnership, and continues the business in his own name and for his own account, he interferes with the firm business, contrary to the provisions of section 17 of the act relating to limited partnerships (1 N. Y. Rev. Stat. 764.) and renders himself liable as a general partner from the very commencement of the partnership. First Nat. Bank *v.* Whitney, 4 Lans. 34.

By written articles of agreement, three persons entered into a special partnership, to continue for a certain limited period; one was a special partner, the others were general partners, and the business was to be conducted in the joint names of the general partners. In a short time afterwards, and before the limited period, a second agreement was entered into between them, by which it was agreed that one of the general partners should sell out to the special partner, and should withdraw from all active participation in the business, and that the special, should become a general partner, but that the partnership should not be dissolved until certain notes given by the firm should be paid; and that in the meantime the partner who sold out should allow his name to be used as one of the firm for business purposes, purchasing goods, etc., and giving notes therefor, and the business was continued without any change in the name of the firm. Goods were purchased and notes were therefor given by the two remaining partners in the original name of the firm, before the expiration of the time limited for the continuance of the original partnership, and before the payment of all the notes mentioned in the second agreement: *Held*, that the second agreement made all three of the parties partners as to third persons until the notes alluded to therein should be paid; and that all three parties were liable on the notes thus given for goods purchased by the new firm. Bulkley *v.* Dingman, 11 Barb. 289.

(*e*) 30 & 31 Vict. c. 131; §§ 4 and 5.

(2.) If a company carries on business for six months with less than seven members, all the members cognizant of the fact are severally liable for the debts contracted by the company during that time, and may be sued accordingly. (*f*.)

A *bonâ fide* compromise of a suit to compel the settlement of a partnership, and the special partner's receipt of what he may believe due him, does not make him a general partner of an expired partnership. Pusey *v.* Dusenbury, 75 Pa. St. 437.

A special partner may make a loan to the firm without becoming necessarily liable as a general partner. Walkenshaw *v.* Perzel, 4 Robt. 426; 32 How. Pr. 233.

Under the Limited Partnership Act of Pennsylvania the special partner cannot claim as a creditor of an insolvent firm, of which he was a member. Dunning's Appeal, 44 Pa. St. 150.

A special partner in a limited partnership, under the statute of New Jersey, cannot recover against the general partners, on a note given by them to him for good consideration, if the partnership is insolvent. Ward *v.* Newell, 42 Barb. 482; 28 How. Pr. 102.

Under the former statutory restriction in New York, a special partner was not entitled to a dividend in common with other firm creditors for cash loaned by him to the firm for the prosecution of its business. White *v.* Hackett, 20 N. Y. 178.

Where a limited partnership becomes insolvent, and the special partner therein is a general partner in another firm to which the limited partnership is indebted, the debt due such firm is to be placed on the same footing with, and is not to be postponed to, the claims of other creditors of said limited partnership in the distribution of its assets. Hayes *v.* Heyer, 35 N. Y. 326.

If A, being a special partner in a firm, takes a deed of trust from such firm, being then insolvent, to secure a debt to a firm of which he is a member, he thereby, in Pennsylvania, renders himself liable as a general partner. McArthur v. Chase, 13 Gratt. 683.

Where a limited partnership, of which A was a special partner, conveyed all its property in trust to pay a debt to a firm of which A was a member, at a time when the partnership was insolvent, the deed was *held*, void as to the other creditors of the firm. Confessions of judgments in favor of some creditors, under similar circumstances, are void as to other creditors. McArthur *v.* Chase, 13 Gratt. 683.

A was a special partner in one firm, and a general partner in another firm. The latter firm was a large creditor of the former, and among the debts was a note made by a member of the former firm, and indorsed by the latter firm, on which a judgment was obtained, which was unsatisfied, except a small dividend declared by the assignee of the former firm, which had failed: *Held*, on a bill by the former firm to postpone the debts of the latter, that those debts ought not to be postponed under the statute of New York regulating limited partnerships. If the same person is a general partner in two firms, his interest in one can be reached by the creditors of the other, by calling it to an account, and by the same rule the solvent firm can recover its debt from the insolvent firm. Hayes *v.* Bement, 3 Sandf. 394.

Whenever the assets of a limited partnership are distributed among its creditors, a firm which has among its members a special partner in the other firm,

(*f*) 25 & 26 Vict. c. 89, § 48.

(3.) The act contains stringent provisions to compel limited companies and their officers to use the word "limited" as part of the name of the company in matters relating to its business (*g*); and persons signing or authorizing the signature on behalf of such a company of any bill of exchange, promissory note, cheque, or order for money or goods, in which the word limited is not used as directed, are themselves liable for the amount, unless the same is duly paid by the company. (*h*)

(4.) The liability of limited banking companies issuing notes is unlimited in respect of such notes. (*i*)

is entitled to a ratable proportion; but the share of said special partner having been ascertained by a commissioner, will be retained, and applied to satisfy the creditors of the limited partnership. McArthur *v.* Chase, 13 Gratt. 683.

On the insolvency of a limited partnership, the partnership property becomes a trust, for the benefit of the creditors; and if the partners neglect to place it in the hands of a trustee for immediate distribution among all the creditors ratably, any creditor may file a bill, on behalf of himself and all other creditors, for distribution of the partnership funds, without first obtaining judgment at law. Innes *v.* Lansing, 7 Paige, 583. See, also, Jackson *v.* Sheldon, 9 Abb. Pr. 127; Whitewright *v.* Stimpson, 2 Barb. 379.

Until an order is made for the appointment of a receiver, the property of an insolvent limited partnership is liable to the execution of a creditor recovering judgment otherwise than by confession, and he may thus obtain a preference. Van Alstyne *v.* Cook, 25 N. Y. 489.

Pending an action by a single creditor of an insolvent limited partnership, to charge the special partner as a general partner, where such special partner denies his liability, and the question can only be determined after a protracted litigation, an order for an injunction and the appointment of a receiver of the assets of the firm, during the litigation, and for the benefit of such creditor alone, will not be granted. Lachaise *v.* Marks, 4 E. D. Smith, 612, note (*a*).

It is not the duty of the special partner to care for or to collect the assets of the firm after failure. Singer *v.* Kelly, 44 Pa. St. 145.

A mortgage given by an insolvent special partner, who by his acts had become liable as a general partner, and who executed the mortgage with intent to give the mortgagees therein (who were individual creditors of the mortgagor) a preference over firm creditors, is void. George *v.* Grant, 20 Hun, 372.

Limited partnerships formed under the statute are governed, and the mutual rights, duties and liabilities of the partners are regulated by the common law, in every respect not taken out of the general rule by the statute. The death of the special partner within the period fixed for the duration of the agreement, dissolves it. Ames *v.* Downing, 1 Bradf. 321; Jacquin *v.* Buisson, 11 How. Pr. 385.

A limited partnership may, in Kentucky, be formed to buy for a single adventure, as a drove of cattle, which done, the power of one partner to bind the other by additional purchases ceases

(*g*) §§ 41 & 42.

(*h*) § 42. See Penrose *v.* Martyr, E. B. & E. 499.

(*i*) § 182.

(5.) Although a company may be registered without limited liability, the liability of its members may be limited by special contract. (*k*)

(6.) The liability of the members of companies not formed under the act but registered under it, is as to all matters occurring after registration the same as the liability of members of companies formed and registered under the act. But as to other matters the extent of liability is the same as if no *registration had taken place. (*l*) Existing companies with unlimited liability may be registered as

Companies registered but not formed under the act of 1862.

*385

when the drove is started. Bently *v.* White, 3 B. Mon. 263.

So, in Illinois, if A enter into a limited partnership with three other parties for a specified object, advancing all the capital, with the accomplishment of that object, it ceases to be partnership property, and if then deposited with one of the partners to the use of A, he may recover it of such partner. Myers *v.* Winn, 16 Ill. 135.

In New York a limited partnership cannot be dissolved by the act of the parties, until four weeks after publication of the notice of dissolution. Bulkley *v.* Marks, 15 Abb. Pr. 454; Buckley *v.* Lord, 24 How. Pr. 455.

The dissolution of a limited partnership, by filing notice with the county clerk, and publication for four weeks, under 1 Rev. Stat. 767, § 24, is not operative until the performance of both those acts. Fanshawe *v.* Lane, 16 Abb. Pr. 71.

In Haggerty *v.* Taylor, 10 Paige, 261, it was held that the publication of notice, at the commencement of a limited partnership, under the statute, stating the duration of the partnership, is sufficient to prevent the general partners from charging the firm with new debts after the expiration of the partnership.

The certificate of the dissolution of a limited partnership, where one is required, must comply with the statute, or such partnership will continue. Re Terry, 5 Biss. 110.

Under N. Y. Rev. Stat, 767, § 24, requiring notice of dissolution of any limited partnership, previous to the time specified in the certificate of its formation to be published "once in each week, for four weeks," the day of the week which is taken for the first publication, must be taken for each of the subsequent publications. *Re* King, 5 Ben. 453; 7 Bankr. Reg. 279.

Actions by or against the firm must be brought by or against the general partners, unless the special partners are, by reason of non-compliance with the statute, also liable as general partners, in which case they also may be joined. Schulten *v.* Lord, 4 E. D. Smith, 206; Artisan's Bank *v.* Treadwell, 34 Barb. 553.

Sec. 19, Chap. 74, Gen. Stat. of Kansas, provides that "actions respecting the business of such partnership may be prosecuted by, and against the general partners only, in the same manner as if

(*k*) § 38, cl. 6.

(*l*) See §§ 179 and 196, cl. 5. The liability under the repealed act of 7 & 8 Vict. c. 110, was unlimited; see § 25. So was the liability under the repealed act 7 & 8 Vict. c. 113; see § 7. The liability under the acts of 1856 and 1857 was substantially the same as that under the Companies act, 1862.

limited companies, and if so registered, the liability of their members as to matters occurring after registration becomes limited also. (*m*) But banking companies existing at the date of the passing of the act and registering under it as limited companies, are bound to give certain notices to their customers before the privilege of limited liability can be claimed as against them. (*n*)

SECTION III.—DURATION OF LIABILITY.

In a preceding chapter it was shown that every member of an ordinary partnership is the general agent of the firm for the purpose of carrying on its business in the ordinary way, but that this doctrine is not applicable to companies the management of whose affairs is entrusted to a few special agents. In the present section it is proposed to ascertain the duration of the agency which exists in each case, or in other words, when it begins and when it ends. Having done this, the mode whereby a partner or shareholder becomes dischargd from liabilities incurred by him will be considered, and thus the liabilities of incoming and outgoing partners and shareholders to creditors will be determined.

1. Commencement of Liability.

A. *In ordinary partnerships.*

The doctrine that each partner has implied authority to do whatever is necessary to carry on the partnership business in the usual way, is based upon the ground that the ordinary business of a firm cannot be carried on either to the advantage *of its members or with safety to the public, unless such a doctrine is recognized. The existence of a part- Commencement of agency. *386

there were no special partners." This limitation on the use of the name of a special partner in actions, by and against a limited partnership extends only to actions respecting the business of the partnership, and does not include actions *inter sese*, or against third parties brought to enforce individual rights growing out of the partnership. *Quære*, the use or omission of the special partner's name in any action is not a mere matter of choice. Spalding v. Black, 22 Kan. 55.

(*m*) See §§ 179, 180.

(*n*) See § 188.

nership is, therefore, evidently presupposed; and although persons negotiating for a partnership, or about to become partners *may* be the agents of each other before the partnership commences, such agency, if relied on, must be established in the ordinary way, and is not to be inferred from the mere fact that the persons in question were engaged in the attainment of some common end, or that they have subsequently become partners. This is shown by the cases already referred to, when the difference between partnerships and inchoate partnerships was being discussed. Almost all those cases, in fact, arose in consequence of attempts made to fasten liability on the defendants, by reason of some act done by other persons, alleged to be their partners; and each of those cases in which the plaintiff failed is an authority for the proposition that so long as there is no partnership there is no implied authority similar to that which exists after a partnership is formed. (*o*)

Liability of partners who defer the execution of articles.

But, although this is undoubted law, still if persons agree to become partners, as from a future day, upon terms to be embodied in a deed to be executed on that day, and the deed is not then executed, but they nevertheless commence their business as partners, they will all be liable for the acts of each, whether those acts occurred before or after the execution of the deed. (*p*)[1] For the question in such a case is not, When was the deed executed? but rather this, When did the partners com-

(*o*) See the cases, *ante*, pp. 26, *et seq.* and 51, *et seq.* and especially Edmundson *v.* Thompson, 2 Fos. & Fin. 564. Gabriel *v.* Evill, 9 M. & W. 297.

(*p*) Battley *v.* Lewis, 1 Man. & Gr. 155.

[1] Notes given in the name of a partnership to commence at a future day, and for goods to form the stock, in trade of such partnership, and received upon the credit of an individual intending to become a member of such partnership, are collectible against such member, even though the partnership never was actually formed. Stiles *v.* Meyer, 64 Barb. 77; S. C. 7 Lans. 190. Thus, upon the representation of one of the partners that M. was to be taken into the firm of J. L. B. & Co. at a certain day, in which representations M. joined, the plaintiffs, sold and delivered goods for the new firm, to be paid for after the day named; the new firm was not formed, and notice of this fact was not given to the plaintiffs, who, after the day took the note of J. L. B. & Co. for the goods: *Held*, that M. was jointly liable with the partners for the goods. Bliss *v.* Swartz, 7 Lans. 187.

A and B entered into partnership, and agreed that the partnership should have relation back to a time specified, and that the firm should be responsible for the debts contracted for goods by A in the intermediate time: *Held*, that the firm was liable for money appropriated to that purpose by A, during the time mentioned, which he held as treasurer of the county. Hutchinson *v.* Smith, 7 Paige, 26.

mence to carry on business as such? The agency begins from that time, whether they choose to execute any partnership deed or not.

Where there is an agreement for a partnership, and there is nothing to lead to the conclusion that the partnership was intended to commence at any other time, it will be held to commence from the date of the agreement. (*q*)

The agency of each partner commencing with the partnership, and not before, it follows that the firm is not liable for *what may be done by any partner before he becomes a member thereof. So that if several persons agree to become partners, and to contribute each a certain quantity of money or goods for the joint benefit of all, each one is solely responsible to those who may have supplied him with the money or goods agreed to be contributed by him (*r*); and the fact that the money or goods so supplied have been brought in by him as agreed, will not render the firm liable. (*s*)[1]

*387 Firm not liable for what a partner does before he joins it.

(*q*) See Williams *v.* Jones, 5 B. & C. 108.

(*r*) See Greenslade *v.* Dower, 7 B. & C. 635; Dickinson *v.* Valpy, 10 B. & C. 141-2; Fisher *v.* Tayler, 3 Hare, 229, 230; and the cases in the next note.

(*s*) Heap *v.* Dobson, 15 C. B. N. S. 460; Smith *v.* Craven, 1 Cr. & J. 500.

[1] See Brooke *v.* Evans, 5 Watts, 196; Baxter *v.* Plunkett, 4 Houst. 450.

By the formation of a partnership the firm does not become liable for the individual contracts of one of its members, or to pay his debts. Even if the firm promises to fulfill such contracts, there must be shown a new consideration to support the promise, and the individual member must be released. If, after the formation of the partnership, two of its members expressly covenant with the third member to perform his contract, made before its formation with a third party, the latter can maintain no action for a breach of such contract against the firm, or the two partners so covenanting, for the reason that the plaintiff is no party to such covenant. Goodenow *v.* Jones, 75 Ill. 48. See, however, Colt *v.* Wilder, 1 Edw. 484.

Appellee H. bought cattle of appellant, but they were not delivered until after the formation of a partnership between appellees H. and D. There was some conflict in evidence as to whether the cattle were sold to the firm, or to H. alone, but it appeared that they were taken by the firm, killed, sold, and the money went into the firm account for its benefit: *Held*, that the cattle remaining with appellant until taken by the firm, unless the jury should believe that it was the intention of the parties that the title should pass to H. at the time the contract was made, the title remained with appellant until they were received by the firm, and the firm receiving them would be liable therefor. If the title had passed to H., and the cattle still remained with appellant unpaid for, it was competent for H. and appellant to annul such purchase, and for H. to receive the cattle on the partnership account, he being a member of the firm, and having authority to make such purchase, and if H. and D. received the cattle from appellant, and the firm did not receive them from H., then they would be liable, no matter what con-

Upon this principle, apparently, it was held in Wilson *v.* Whitehead (*t*), that the author and publisher of a work were not liable for the paper supplied for it; the paper having been ordered by and supplied to the printer, who was to share the profits of the work. The agreement between the parties was that one should be the publisher, and make and receive general payments; that another should be editor; and that the third should print and find the paper for the work, charging it, however, to the account of the three at cost price. The profits were to be equally divided amongst the three. It was, therefore, urged that all were liable for the paper supplied; but it was held that they were not; for the printer was not authorized to buy the paper except on his own account, and when he had bought it he might have used it for some other book. The case was likened to that of coach proprietors, where each horses the coach for one or more stages, and each agrees to bring into the concern the work and labor of his horses, and none of the others has any interest in them, though all share the profits. (*u*)

Wilson *v.* Whitehead.

The propriety of the decision in this case has been doubted (*x*), and it is not easily reconcilable with a similar case decided at Nisi Prius. (*y*) But the writer submits that upon principle Wilson *v.* Whitehead is perfectly correct; for *388 *the publisher had no real authority to buy the paper on the author's credit, and no authority so to do ought to be implied in favor of a person who knew nothing of the author or of any partnership or quasi-partnership existing between him and the publisher. (*z*)

Observations on this case.

The two well-known cases of Saville *v.* Robertson (*a*) and Gouthwaite *v.* Duckworth (*b*), further illustrate the principle now in question. These cases closely resemble each

Saville *v.* Robertson, Gouthwaite *v.* Duckworth.

tract existed between H. and appellant. Smith *v.* Hood, 4 Brad. 360.

It was error to refuse the admission in evidence of the partnership books, so that the jury might see whether H. ever received credit by the cattle by the firm, and also show the state of the account of D. and H. with the firm. Smith *v.* Hood, *sup.*

(*t*) 10 M. & W. 503. See the observations of Wightman, J., on this case, in Kilshaw *v.* Jukes, 3 B. & Sm. 847.

(*u*) Barton *v.* Hanson, 2 Taunt. 49, which shows that in such a case each is alone liable for hay, &c., supplied to his own horses.

(*x*) See *per* Wightman, J. in 3 Best & Sm. 871.

(*y*) Gardiner *v.* Childs, 8 Car. & P. 345.

(*z*) See Kilshaw *v.* Jukes, 3 Best & Sm. 847, and *ante*, p. 39.

(*a*) 4 T. R. 720.

(*b*) 2 East, 421.

other in many respects: for in each there was an agreement for a joint adventure in goods; in each an attempt was made to compel a person who did not order the goods to pay for them, on the grounds that he was in partnership with the person who did order them, and that they were supplied and used for the joint adventure; and in each the defense was that the goods were ordered before any partnership commenced, so that the defendant was not liable for the purchase made by his co-partner. In Saville *v.* Robertson the defense was proved and prevailed, whilst in Gouthwaite *v.* Duckworth the defendant was compelled to pay. In order to explain the apparent conflict between the two cases, it is necessary to state shortly the material facts in each.

In Saville *v.* Robertson (*c*), several persons agreed to share the profit and loss of an adventure in goods, of a kind to be fixed by a majority; but no one was to have any share or proportion in the adventure except to the amount of the goods ordered and shipped by himself; and no adventurer was to be answerable for anything ordered or shipped by any co-adventurer. One of the adventurers having ordered goods and not paid for them, it was contended that his co-adventurers were liable for them, on the ground that he and they were partners. But the Court held that no partnership commenced until the goods were on board; each partner was to bring in his share only, and his co-partners were not liable to persons who supplied him with the means which enabled him to bring in such share. Saville *v.* Robertson.

*In Gouthwaite *v.* Duckworth (*d*), Browne and Powell, *389 who were in partnership, were indebted to Duckworth, and it was agreed that all three should join in an adventure in the purchase and sale of goods; that the goods should be bought, paid for, and shipped by Browne & Powell, and that the proceeds of the sale should be remitted to Duckworth, who should deduct thereout the amount of his debt, and then share the profit of the adventure with Browne and Powell. It was also agreed that in the event of a loss, Duckworth should share it. In consequence of this agreement, Browne bought goods for the ad- Gouthwaite *v.* Duckworth.

(*c*) 4 T. R. 720. See, also, Hutton *v.* Bullock, L. R. 8 Q. B. 331, and 9 ib. 572; Kilshaw *v.* Jukes, 3 Best & Sm. 847.

(*d*) 2 East, 421; Kilshaw *v.* Jukes, 3 B. & Sm. 847, was certainly very like this case, but was decided in accordance with Saville *v.* Robertson. See *ante*, p. 39.

venture on credit, and it was held that all the three, viz., Browne, Powell and Duckworth, were liable to pay for them; for the goods were bought in pursuance of the agreement for *the adventure*, and although it was never intended that Duckworth should pay for the goods, yet it was thought that the adventure commenced with the purchase of the goods, and that Duckworth was therefore liable.

Observations on Guthwaite v. Dockworth.

There is considerable difficulty in supporting this decision, if rested on the ground of partnership and implied agency resulting therefrom; for it is not easy to see how any partnership existed prior to the purchase of the goods. But if rested on the ground of agency, independently of partnership, there is not the same difficulty. For although the goods were to be paid for by Browne and Powell, that might be regarded as nothing more than a stipulation to take effect as between them and Duckworth; it did not necessarily exclude the inference that as Browne and Powell were to buy for the adventure, they were at liberty to procure the goods on the credit of all concerned. (*e*)

Liability of incoming partner.

As the firm is not liable for what is done by its members before the partnership between them commences, so upon the very same principle a person who is admitted as a partner into an existing firm does not by his entry become liable to the creditors of the firm for anything done before he became a partner. Each partner is, it is true, the agent of the *390 firm, *but, as before pointed out, the firm is not distinguishable from the persons from time to time composing it; and when a new member is admitted he becomes one of the firm for the future, but not as from the past; and his present connection with the firm is no evidence that he ever expressly or impliedly authorized what may have been done prior to his admission. It may, perhaps, be said that his entry amounts to a ratification by him of what his now partners may have done before he joined them. (*f*) But it must be borne in mind that no person can be rendered liable for the act of another on the ground that he has ratified, confirmed or adopted it, unless at the time the act was done it was done on his behalf. (*g*)[1] Therefore, in Young *v.* Hunter (*h*), where Hunter & Co. had ordered goods of

Young v. Hunter.

(*e*) See Young *v.* Hunter, 4 Taunt. 582, the judgment of Gibbs, J.

(*f*) See Horsley *v.* Bell, 1 Bro. C. C. 101, note, *per* Gould, J.

(*g*) Wilson *v.* Tumman, 6 Man. & Gr 236.

[1] See Ewell's Evans on Agency, *54 and note.

(*h*) 4 Taunt. 582.

the plaintiff for sale in the Baltic, and *afterwards* it was agreed between Hunter & Co. and Hoffham & Co. that the latter should join in the adventure, and share the profit and loss, it was held to be clear that Hoffham & Co. were not liable to the plaintiff to pay for the goods.

So in *Ex parte* Jackson (*i*), a person who was indebted by bond for money borrowed to carry on a trade, took two other persons ostensibly into partnership. After two years a joint commission of bankruptcy issued against the three; and it was held that the bond debt was not provable as a partnership debt against the joint estate, but remained what it was originally, the separate debt of the obligor.

Ex parte Jackson.

Again, in Beale *v.* Mouls (*k*), the members of a provisional committe of a company entered into a special agreement with the plaintiff for the manufacture of a steam carriage. Afterwards, but before the contract was completed, the defendant Mouls became a member of the committee, and interested himself in the completion of the carriage. Several alterations and payments on account were also made whilst he was a member, and with his knowledge. The carriage was completed, but the committee then refused to take it or to pay for it. In *an action brought against Mouls *391 and the other members of the committee, it was held that Mouls was not liable. He was not liable on the special contract, for he was no party thereto, by himself or any agent; and he could not be made liable on any implied contract, for the existence of a special agreement excluded any implied contract relative to the same subject matter. It follows from the principles on which this case was determined, that if the carriage had been accepted by the committee, Mouls would not have been liable to pay for it. The delivery and acceptance in such a case would have been in pursuance of the contract, to which *ex hypothesi* he was no party; and no liability could attach to him by virtue of any implied contract to pay that which became payable by virtue of an express contract made with other people. It has, indeed, been expressly decided, that if several members of a committee order goods, and then a new

Application of principle to promoters of companies.

Beale v. Mouls.

(*i*) 1 Ves. J. 131.

(*k*) 10 Q. B. 976. See, too, Brenmer *v.* Chamberlayne, 2 Car. & Kir. 569; Kerridge *v.* Hesse, 9 C. & P. 200.

member joins the committee, he is not liable to pay for the goods, though they are delivered after he joined it. (*l*)

New contract. Dyke v. Brewer.

Cases, however, of this kind must not be confounded with those in which a new though tacit contract is made after the introduction of a new partner. Dyke *v.* Brewer (*m*) illustrates the distinction alluded to. In that case the plaintiff agreed with A. to supply him with bricks at so much per thousand, and the plaintiff began to supply them accordingly. B. then entered into partnership with A., and the plaintiff continued to supply bricks as before. It was held that both A. and B. were liable to pay, at the rate agreed upon, for the bricks supplied to both after the partnership commenced. The ground of this decision was, that as A. had not ordered any definite number of bricks, each delivery and acceptance raised a new tacit promise to pay on the old terms; although if all the bricks delivered had been ordered by A. in the first instance, he alone would have been liable to pay for them. (*n*)

*392 *If an incoming partner chooses to make himself liable for the debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing. But it must be borne in mind, that even if an incoming partner agrees with his co-partners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners, is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partner. (*o*)[1] In order to render an incoming

Incoming partner taking debts on himself.

(*l*) Newton *v.* Belcher, 12 Q. B. 921; Whitehead *v.* Barron, 2 Moo. & Rob. 242. In Beech *v.* Eyre, 5 Man. & Gr. 415, the goods were both ordered and supplied at a time when there was evidence to show that the defendant was one of the committee.

(*m*) 2 Car. & Kir. 828.

(*n*) Helsby *v.* Mears, 5 B. & C. 504, is another case turning on the same principle as is explained by Lord Denman in Beale *v.* Mouls, 10 Q. B. 976.

(*o*) See *per* Parke, J., in Vere *v.* Ashby, 10 B. & C. 298; *Ex parte* Peele, 6 Ves. 602; *Ex parte* Williams, Buck, 13.

[1] An agreement between an incoming partner and the co-partners, that the former shall share the liability for the debts of the concern, does not entitle the creditors to sue him. To warrant this, there must be some agreement between him and the creditors, and it must be founded on a sufficient consideration. Morehead *v.* Wriston, 73 N. C. 398. See *post*, 435. See, however, Colt *v.* Wilder, 1 Edw. 484; Arnold *v.* Nichols, 64 N. Y. 117.

T. bought the interest of H. in the firm of H. & W., and, with W., gave H. a bond of indemnity against all debts of the old firm, covenanting to pay them: *Held*, that the creditors of the old firm

partner liable to the creditors of the old firm, there must be some agreement, express or tacit, to that effect, entered into between him and the creditors, and founded on some sufficient consideration.[1] If there be any such agreement, the incoming partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue of the new agreement, and not by reason of his having become a partner.

had no right of action against the new, upon the bond, for want of privity thereto. Hicks *v.* Wyatt, 23 Ark. 55.

A and B having been partners, C purchased the interest of A in the firm, agreeing to pay one-half of the partnership debts of A and B and B, and C then formed a partnership. Afterwards, differences having arisen between A on the one part, and B and C on the other part, they submitted the differences to arbitration, and an award was made setting forth, *inter alia*, that C had purchased from A an undivided one-half of the property, etc., of the firm of A and B, and had engaged in the purchase to pay half of the debts of said firm, etc. *Held*, that the partnership debts of A and B did not become debts of the firm of B and C by the terms of the award. Hyer *v.* Norton, 26 Ind. 269.

F., by an agreement in writing, purchased the interest of S., in the firm of S. & O., and bound himself "to assume all the debts and liabilities of said S. in the late firm, and to save him harmless on account of all debts whatever of said firm:" *Held*, that a creditor of the firm was entitled to be substituted to a personal judgment against F., on his agreement in favor of S., the latter consenting thereto. Francis *v.* Smith, 1 Duv. 121.

See next note, *infra*.

One G. held a lease from plaintiff, of a store in which he was doing business; the unexpired term was over two years. He entered into a co-partnership agreement with defendant for the term of one year and one month. In the preliminary negotiations it was agreed by parol, that in consideration that G. should put the lease into the partnership, the rent for the whole unexpired term should be regarded as a partnership liability, and as one of the debts created on account of the firm. By the written agreement it was stipulated that each partner should be equally liable for "all debts and liabilities suffered or created by or on account of" the firm business. No mention was made in this agreement of the lease. The firm continued business for about eight months, and then dissolved, and soon thereafter the business was assigned to another, who went into possession. In an action to recover an installment of rent, accruing more than a year after the formation of the partnership, *held*, (Reynolds and Johnson, CC., dissenting), that defendant was not liable; that he was not liable as assignee of the lease, for the reason that such liability, if it ever existed, continued so long only as the privity of estate continued, and ceased upon the transfer and surrender of possession; that the rent could not be made a firm debt by parol agreement, as such a term could not be created or assigned by parol (2 R. S. 135, § 8,) and that the agreement to pay the rent for the whole time was void, as by its terms it could not be performed within a year (2 R. S. 136, § 2). Durand *v.* Curtis, 57 N. Y. 7.

[1] There is no presumption that one who becomes a member of an existing firm, assumes liability for previous debts or contracts of the firm. Fuller *v.* Rowe,

An agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm, may be, and in practice generally is, established

Evidence of agreement to do so.

56 Barb. 344. But on the contrary, the presumption of law is that an incoming partner is not liable for debts of the firm contracted before he entered. Kountz *v.* Holthouse, 85 Pa. St. 235. And as a general rule a new partner is not bound for the debts of the firm contracted before he became a member. Babcock *v.* Stewart, 58 Pa. St. 179; Deere *v.* Plant, 42 Mo. 60; Harp *v.* Tomlinson, 2 Vt. 103; Adkins *v.* Arthur, 33 Tex. 431; Atwood *v.* Lockhart, 4 McLean, 350.

Where, however, a wife becomes a co-partner in the place of her deceased husband, the presumption will be indulged that she becomes liable for his partnership debts, and a mortgage executed therefor, is sustained by a good consideration. Preusser *v.* Henshaw, 49 Iowa, 41.

The cases generally lay down the rule that an incoming partner does not become liable for antecedent debts of the firm without an express undertaking to that effect upon a sufficient consideration. Meador *v.* Hughes, 14 Bush, 652; Wright *v.* Brosseau, 73 Ill. 381; Parmalee *v.* Wiggenhorn, 6 Neb. 322; Fagan *v.* Long, 30 Mo. 222; Stenburg *v.* Callanan, 14 Iowa, 251.

While, however, an incoming partner is not liable for the prior debts of the firm, without a special promise, yet very slight testimony will be sufficient to prove an assumption by him of those debts. Cross *v.* Burlington Nat. Bank, 17 Kan. 336. See, also, Wheat *v.* Hamilton, 53 Ind. 256.

In Shoemaker Piano Co. *v.* Bernard, 2 Lea (Tenn.) 358, the rule is more correctly laid down, that in order to hold an incoming partner bound for the pre-existing debts of a firm, he must become liable for such debts by either expressly assuming them upon proper consideration, or by otherwise dealing with the creditor in such a manner as to create an implied obligation and duty to pay the same in common with the old firm. And in either aspect of the rule the assent of the party to be charged and the consent of the creditor to accept the new liability, are necessary to the new partner's liability. See, also, Fagan *v.* Long, 30 Mo. 222.

In other words, an incoming partner will not be liable to a firm creditor for an old debt of the firm, unless there is a novation of the debt by a new promise by the entire new firm, upon a valid consideration, and a discharge of the old firm upon the old debt. Stenburg *v.* Callanan, 14 Iowa, 251.

There must be the concurrent consent of three parties, the creditors, the old firm and the new. Spannhorst *v.* Link, 46 Mo. 197.

In Updike *v.* Doyle, 7 R. I. 446, the rule is stated that the assumption by incoming partners of pre-existing debts of the concern, may both at law and in equity, either be proved by their express covenant or contract, or be inferred from the terms of it, or from the treatment of such debts by the firm, to the knowledge of the incoming partners, as the debts of the new firm.

If the drawee of a draft given in payment for goods, before its acceptance, forms a partnership with others, and the partners agree that the goods shall be used in the partnership business, and be paid for by the firm, and the partner who is the drawee, accepts the draft for the firm, the acceptance is binding on the partners. Markham *v.* Hazen, 48 Ga. 570.

A partner who on a dissolution buys his co-partners's interest, taking the as-

by indirect evidence. The Courts, it has been said, lean in favor of such an agreement, and are ready to infer it from slight circumstances (*p*); and they seem formerly to have inferred it whenever

sets, is bound, though not so originally, for a debt which from entries in the books, made the basis of their settlement, it appears was assumed by the firm. The settlement ratifies the unauthorized assumption. Hopkins *v.* Johnson, 2 La. Ann. 842.

Where a party purchases an interest in a commercial house, entitling him "to an equal undivided one-third interest and ownership, and to all stock of merchandise, bills receivable, and debts in book accounts on hand, due or owing to the firm on a given day (over and above the payment of the liabilities of said firm)," he is responsible for the debts of the house existing at the time of purchase. Hughes *v.* Waldo, 14 La. Ann. 348.

Where a retiring partner sold his interest in the firm to A, who undertook to be responsible for the firm's debts to the extent of the vendor's liability, and he became a member of the firm, and the new firm did pay some of the old firm's debts, and the assets which the retiring partner left were sufficient to pay all the firm's debts: *Held*, in a suit by the retiring partner, to compel an application of the firm's assets to the payment of the old firm's debts, that the undertaking by the new firm to pay the old firm's debts, would be implied, but as no fraud was proved, that the complainant was only entitled to be repaid that which he had been compelled to pay as partner. Peyton *v.* Lewis, 12 B. Mon. 356.

A, being a member of a firm, and having contributed to the stock of the company less than he had agreed on forming he partnership, sold out his interest to B, with the assent of the other partners, and was released by them from all liability to pay any of "the debts due by, or demands which might be brought against, said establishment:" *Held*, that B, succeeding to the interest of A, took upon himself the liability of A to contribute to the other members of the firm. Conwell *v.* Sandidge, 5 Dana, 210.

Two consignees became partners for the transaction of commission business, and, circumstances tending to show that they turned their separate consignments into common stock, both were held liable for the proceeds. Dix *v.* Otis, 5 Pick. 38.

Where a party stores grain in the cribs of one buying grain for himself, but which grain is simply taken for storage and not mixed with other grain of the bailee, and the bailee afterwards, upon entering into partnership with others in the business, receives credit for the grain so stored with him as so much capital, the title to the corn will not pass to them as in the case of a purchase from a warehouseman when the corn is commingled with other grain, but the firm will sustain the same relation to the bailor as the original bailee, and on a sale of such corn by the firm, all its members will be liable to the bailor for the proceeds. Rankin *v.* Shephardson, 89 Ill. 445.

A co-partner cannot make an incoming partner liable for the pre-existing debts by giving the note of the new firm therefor. Fagan *v.* Long, *supra*.

A commercial partnership is not liable on the obligations contracted by one of the partners previous to the formation

(*p*) *Ex parte* Jackson, 1 Ves. J. 131; *Ex parte* Peele, 6 Ves. 602. See, also, Rolfe *v.* Flower, L. R. 1 P. C. 27.

the incoming partner agreed with the other partners to treat such debts as those of the new firm. (*q*) But this certainly is not enough, for the agreement to be proved is an agreement with the creditor; and of such an agreement an arrangement between the partners is of itself no evidence. (*r*)

of the partnership, notwithstanding the fact that the partnership was to continue the same business in which the obligations were contracted, and that specified portions thereof were assumed by the individual members. Mosseau *v.* Thebens, 19 La. Ann. 516.

Where, however, in an action on a promissory note given in the name of a firm by one of its members, to the plaintiff, the consideration of which was in part goods sold to a former firm, composed of different members, although carrying on the same business, there was evidence that, at an interview lasting an hour, at which the plaintiff's account was presented and examined and the note signed therefor, J. S., a member of both firms, was present, although he did not join in the conversation and had no charge of the financial business of the firms; and that the account was made out to the new firm, although many of the items were due from the old firm; but there was no evidence of any intentional deception on the part of the plaintiff; it was held that the evidence justified the jury in finding an assent by J. S. to the giving of the note. Shaw *v.* McGregory, 105 Mass. 96.

A agreed in writing to deliver 2,000 cords of wood, at a specified price per cord, to the plaintiff. Afterwards he formed a co-partnership with B & C in the lumber and wood business, and, through the firm, he delivered a part of the wood, the firm takng the pay in their name and remitting the same to A, after deducting commissions: *Held*, in a suit by the plaintiff against the firm for failing to deliver the balance of the wood, that B & C were not liable. Goodenow *v.* Jones, 75 Ill. 48.

A contract between two firms, to pack pork on joint account, did not have the effect of consolidating the two firms, or of making either liable for the antecedent debts of the other. Meader *v.* Hughes, 14 Bush, 652.

The assignment of its assets for the benefit of its creditors, made by a defunct partnership to an individual member of a new partnership, succeeding to the former business of the old concern, will not make the new partnership liable to the defunct partnership for the value of any of its assets, and therefore not amenable to a garnishment at the suit of any creditor of the defunct concern. Bancker *v.* Harrington, 30 La. An. 136.

Where the purchaser of a lot of mules upon credit, which were to be delivered to him at a future time, before their delivery formed a partnership with another person, with the agreement that the mules were to be put into the joint stock, and sold on joint account, and they were so sold: *Held*, that the surety on the notes given by the purchaser for the mules, who had been compelled to pay the notes, could not hold the partner liable as a joint purchaser. Duncan *v.* Lewis, 1 Duv. 183.

Where a partnership between attor-

(*q*) See Cooke's Bank Law, 534 (8th ed.), citing *Ex parte* Bingham and *Re* Staples; *Ex parte* Clowes, 2 Bro. C. C. 595.

(*r*) *Ex parte* Peele, 6 Ves. 602; *Ex parte* Parker, 2 M. D. & D. 511. See, also, *Ex parte* Freeman, Buck, 471; *Ex parte* Fry, 1 Gl. & J. 96; *Ex parte* Williams, Buck, 13.

As an instance where an incoming partner made himself liable for debts contracted by the firm before he joined it, reference may be made to *Ex parte* Whitmore. (*s*) In that *case Warwick and Clagett became partners. War- *393 wick, who had had dealings with merchants in America, informed them that he had taken Clagett into partnership, and requested them to make up their accounts, and transfer any balance due to or from him (Warwick) to the new firm. These instructions were repeated and confirmed by Warwick and Clagett, and were acted on. A debt owing from Warwick was placed to the debit of the new firm, and a bill was drawn on the firm for the amount of the debt and was accepted, but was dishonored. On the bankruptcy of the firm it was held, that the debt in question had become the joint debt of Warwick and Clagett; and not only so, but that the joint liability of the two had been accepted in lieu of the sole liability of Warwick.

Ex parte Whitmore.

Before leaving this subject, it may be as well to observe that, as an incoming partner does not, by the fact of entering the firm, take upon himself the then existing liabilities thereof, if after he has joined the firm his co-partners give a bill or note in their and his name for a debt contracted by them alone, this is *primâ facie* a fraud upon him, and conse-

Bills by old partners for old debts a fraud on new partner.

neys was dissolved after a suit begun, and a new partnership formed by one of the former partners and a new partner, which in turn was dissolved before the money in the suit was collected, an action for detaining the amount collected cannot be maintained against the new partner, the other alone having been attorney of record in that suit. Ayrault *v.* Chamberlin, 26 Barb. 83.

Where debts of an old firm are charged to the new firm on its books, the rule that entries on the books of a firm shall bind the firm, has no application to the liability of the new partner for debts of the old firm so charged, unless he had access to the books and was thereby enabled to know what had been done. In such case his consent to be bound will be implied if he fail to object at the time when he first has notice of such entries. Shoemaker Piano Co. *v.* Bernard, 2 Lea (Tenn.), 358.

Goods were purchased by one person for which a promissory note was given. Afterwards he entered into partnership with another, and by consent of both partners, and of the holder of the note, the words "and company" were added to the signature of the maker, to make the note stand against the firm: *Held*, that the note was binding on the partnership. Crum *v.* Abbott, 2 McLean, 233.

A new firm, though composed entirely of a portion of the members of a former firm which is dissolved, cannot be sued jointly in their partnership name for the debt of the old firm. Shorter *v.* Highlower, 48 Ala. 526.

(*s*) 3 Deac. 365. See, also, Rolfe *v.* Flower, L. R. 1 P. C. 27, which was a stronger case.

quently he will not be liable to a holder with notice. (*t*) For similar reasons, an incoming partner will not, it is apprehended, be liable to pay a debt contracted before he became a partner, merely because his co-partner has afterwards stated an account with the creditor, and thereby admitted that the debt in question is due from the firm. (*u*) But, as will be seen hereafter, an incoming partner, unless he takes care, may find himself liable to pay the balance of an open running account commencing before he joined the firm and continued afterwards, although payments have been made since he joined the firm sufficient to liquidate that part of the account for which he is directly responsible. (*x*)

Account stated in respect of old debt.

*394 *COMMENCEMENT OF LIABILITY (*continued*).

B. *In Companies.*

In applying the above principles to companies, care must be taken to distinguish between the liabilities of partners *inter se* and their liabilities to creditors; for although, as has been seen, an incoming partner is not liable to creditors upon contracts made before he became a partner, he may have been admitted into partnership only upon the terms that, as between him and the other partners, he shall contribute to existing liabilities. And when a person takes shares in a company, he, as between himself and other shareholders, takes those shares with all the rights and liabilities attaching to them, so that his co-shareholders have a perfect right to insist upon his contributing with them towards the liquidation of debts contracted before he joined the company. (*y*) And even as regards creditors, the liability of a shareholder to them does not depend altogether upon the ordinary principles of partnership, but upon statutory enactments,

Commencement of shareholder's liabilities.

(*t*) See Shirreff *v.* Wilks, 1 East, 48, *ante*, p. 331.

(*u*) See as to accounts stated, French *v.* French, 2 Man. & Gr. 644, and Lemere *v.* Elliott, 6 H. & N. 656.

(*x*) See Beale *v.* Caddick, 2 H. & N. 326, and Scott *v.* Beale, 6 Jur. N. S. 359, noticed *infra*, under the head of Appropriation of Payments.

(*y*) Taylor *v.* Ifill, 1 N. R. 566, V.-C. W.; Cape's Executor's case, 2 DeG. M. & G. 562; Mayhew's case, 5 ib. 837. See, too, Horsley *v.* Bell, 1 Bro. C. C. 101, note. Sanderson's case, 3 DeG. & S. 66, *contra*, cannot be regarded as correct on this point. See Henderson *v.* Sanderson, 3 H. L. C. 698.

which must not be overlooked. These enactments will be examined hereafter, but it may be stated generally, that in all companies regulated by the 7 Geo. 4, c. 46, 8 & 9 Vict. c. 16, or the Companies act 1862, an incoming shareholder is, so long as he remains a shareholder, liable to creditors in respect of debts incurred by the company before he became a shareholder. (z) The Letters Patent act (7 Will. 4 & 1 Vict. c. 73, § 24) is so worded as to be capable of receiving a different construction in this respect; but probably a different construction would not be put upon it; for it would be highly inconvenient to apply different principles to different companies if it can be avoided, and there certainly *is no sufficient reason for any distinction between them *395 with reference to the liability alluded to. (a)

Where, however, there is no statute to help the creditor, the ordinary partnership rule applies; and therefore, where a creditor sued a shareholder in a cost-book mining company for goods supplied to the company before the defendant became a shareholder, the creditor was held not entitled to recover. (b)

Liabilities of companies for acts of their promoters.

The most important application to companies of the principles discussed in the forgoing pages, is to be found in the rule that a company is not liable for the acts and engagements of its promoters, unless it is made so by its charter, act of Parliament, or deed of settlement, or unless it has become so by what it has done since its formation. (c)

Where liability is imposed by constitution of company.

When a company is formed by act of Parliament, the subscribers are usually bound by the terms of the act obtained by the promoters of the company (d); and if that act says that the company is to be liable for debts and liabilities incurred before its formation, of course it will be so liable, and the only question which can arise in such a case is as to the true construction of the act, and the remedy upon it. (e) The

(z) The same was true of companies governed by the repealed acts, 7 & 8 Vict. cc. 110 and 113, and the Joint Stock Companies acts, 1856 and 1857.

(a) This point was apparently intended to be raised in Philipson v. Egremont, 6 Q. B. 587, but it was not decided.

(b) Thomas v. Clarke, 18 C. B. 662. See, too, Thomas v. Hobler, 4 DeG. F. & J. 199.

(c) As to provisional contracts for the purchase of lands by the promoters of railway companies, see 27 & 28 Vict. c. 121, § 3.

(d) See as to this, *ante*, p. 110.

(e) In Tilson v. The Warwick Gas Light Company, 4 B. & C. 962; Carden v. The General Cemetery Co. 5 Bing. N. C. 253; and Clowes v. Brettell, 10 M. & W. 506, an action was held to lie against a company for the expenses of

Companies Clauses Consolidation Act renders companies governed by it liable for the expenses of obtaining their special act, and they can be sued for such expenses accordingly. (*f*)

*396 *Again, a company's articles of association or deed of settlement only affect the members *inter se*, or the parties to the deed; and a clause adopting an agreement made by the promoters does not of itself amount to a contract on which the company can be sued by a person with whom the company has not, in fact, entered into an agreement. (*g*) But if such clause entitles the promoters with whom the agreement was made to be indemnified against it by the company, or if such clause converts the company into a trustee for the promoters, a suit in equity might formerly, and it is conceived that an action may now (*h*), be maintained against the company and the promoters in the first case, or against the company alone in the last, to enfore the agreement. (*i*)

Adoption by the company.

Whether the circumstance that a company has had the benefit of an agreement entered into by its promoters is of itself sufficient to render the company liable to be sued upon it, can, perhaps, hardly be considered settled (*k*) but on principle this circumstance alone ought not to be sufficient (*l*)

Company taking the benefit of the agreement.

its formation, by reason of its act ot Parliament. In Doe *v.* Knebell, 2 Moo. & R. 66, a company was held entitled by virtue of its act of incorporation, to maintain ejectment upon a breach of covenant in a lease granted by its promoters.

(*f*) 8 & 9 Vict. c. 16, § 65; 27 & 28 Vict. c. 121, § 3, *et seq.*; Hitchins *v.* The Kilkenny Rail. Co. 9 C. B. 536; Shaw's claim, 10 Ch. 177; Kensington Station Act, 20 Eq. 197. Compare Spackman *v.* Lattimore, 3 Giff. 16, in which an injunction was granted to restrain payment by a company of money borrowed for the purpose of obtaining an act. The case turned on the representations made to Parliament.

(*g*) Melhado *v.* Porto Aligre, &c. Rail Co. L. R. 9 Q. B. 503, where the directors had an option; Eley *v.* Positive Ass. Co. L. R. 1 Ex. D. 20 & 88, and observe that the plaintiff there was a member of the company. See, as to the adoption by a company of a contract entered into by its promoters before its formation, Spiller *v.* Paris Skating Rink Co. 7 Ch. D. 368.

(*h*) It could not before the Judicature Acts. See Gunn *v.* London and Lancashire Fire Ins. Co. 12 C. B. N. S. 694, and the last note.

(*i*) See Touche *v.* Metropolitan Rail. Co. 6 Ch. 671; Terrell *v.* Hutton, 4 H. L. C. 1091; Parsons *v.* Spooner, 5 Ha. 102; Wilkins *v.* Roebuck, 4 Drew. 281; Hopkinson's case, 7 DeG. M. & G. 193.

(*k*) This clearly is not enough at law. See Melhado *v.* Porto Aligre, &c. Rail. Co. L. R. 9 C. P. 503. The doubt arises from decisions in equity, noticed *infra*. And see Hereford and South Wales Wagon Co. 2 Ch. D. 621, where the claim would have been allowed if there had been no fraud.

(*l*) See *ante*, p. 361, *et seq.*

although there may be cases in which it may be inequitable to allow a company to hold and enjoy property discharged from those obligations which were contracted by the promoters who enabled the company to acquire it.

But in the absence of special circumstances, such as those above alluded to, a company is not liable for what may have been done by its promoters. Thus, it was held that a company formed under the repealed act, 7 & 8 Vict. c. 110, was not liable to pay for the services of agents employed by its *promoters (before provisional registration) for purposes con- *397 nected with the establishment of the company (*m*); and that agreements entered into after provisional but before complete registration, only bound the company when they were expressly made binding by the act itself. (*n*)

Ordinary rule in other cases.

In cases of this description the promoters themselves are liable on the contracts entered into by themselves (*o*); but the company does not exist when the contract is entered into, and cannot therefore be bound by that contract when it is made. Moreover, there is considerable difficulty in holding that a company can ratify a contract made by its promoters, so as to render such contract binding upon itself from a time anterior to its own existence (*p*); a clause in a company's articles of association is not sufficient for the purpose. (*q*) At the same time, an agreement by a company to do what its promoters have undertaken it shall do, may obviously be entered into, and such an agreement, if entered into, and if not *ultra vires*, will be

Why companies are not bound by the acts of their promoters.

(*m*) Hutchison *v.* Surrey Gas Co. 11 C. B. 689; and 3 Car. & Kir. 45.

(*n*) Payne *v.* N. S. Wales Co. 10 Ex. 283; Gunn *v.* Lond. and Lancashire Fire Insur. Co. 12 C. B. N. S. 694. These cases turned on 7 & 8 Vict. c. 110, §§ 23, 25, as to which, see, also, Taylor *v.* Crowland Gas Co. 10 Ex. 288, note; Terrell's case, 2 Sim. N. S. 126; Lloyd's case, 1 ib. 248. Terrell's case was reversed on appeal, but the principle on which it was decided below is not impeachable. See Terrell *v.* Hutton, 4 H. L. C. 1091.

(*o*) Kelner *v.* Baxter, L. R. 2 C. P. 174; Scott *v.* Lord Ebury, ib. 255; Lake *v.* Argyll, 6 Q. B. 477; Barton *v.* Hutchinson, 2 Car. & K. 712; Cullen *v.* O'Meara, Ir. Rep. 5 Com. L. 640.

(*p*) See Wilson *v.* Tumman, 6 Man. and Gr. 236; Gunn *v.* London and Lancashire Fire Insur. Co. 12 C. B. N. S. 694; Kelner *v.* Baxter, L. R. 2 C. P. 174; Scott *v.* Lord Ebury, ib. 255.

(*q*) Eley *v.* Positive Ass. Co. L. R. 1 Ex. D. 20 and 88.

binding on the company. This appears to have been the true *ratio decidendi* in Browning *v.* Great Central Mining Company (*r*), in which a company registered under the Companies act of 1856 was held liable to pay the wages of a person appointed by the promoters of the company to be the manager of the company's works. The company when formed retained the manager in its service, and there were other circumstances *warranting the inference that the company had appointed him its manager, although there was no evidence of any formal appointment, as required by the articles of association. The jury having found a verdict for the manager, the Court declined to disturb it. The salary sued for appears to have been calculated from a period anterior to the registration of the company, but upon this point there is some obscurity.

Browning *v.* Great Central Mining Company.

*398

The difficulty of holding companies bound by the acts of their promoters has been felt as much in equity as at law (*s*); but where a company has acquired property or exercised rights under an agreement entered into with its promoters, there is a strong tendency to treat such agreement as binding on the company, provided the agreement is one by which the company would have been bound if the agreement had been entered into on its behalf after its formation. (*t*) The leading case on this subject is Edwards *v.* The Grand Junction Railway Co. (*u*), in which an agreement between the trustees of a turnpike road and the promoters of a railway company was entered into, to the effect that the trustees should withdraw their opposition to the company's bill, and that the company should, if its bill passed, carry the turnpike road over a bridge of certain dimensions. The trustees withdrew their opposition, the bill passed, and the company refused to perform the agreement. An

Liability in equity.

Edwards *v.* Grand Junction Railway Company.

(*r*) 5 H. & N. 856. See, also, Pilbrow *v.* Pilbrow's Atmospheric Rail. Co. 5 C. B. 440, where there was a contract by the company with the plaintiff.

(*s*) See the cases in the next two notes; and as to contracts under seal, Pickering's claim, 6 Ch. 525.

(*t*) This condition is essential. See Shrewsbury *v.* North Staffordshire Rail. Co. 1 Eq. 593, noticed *infra*, p. 401.

(*u*) 1 M. & Cr. 650, affirming S. C. 7 Sim. 337. See, also, Petre *v.* The Eastern Counties Rail. Co. 1 Ra. Ca. 462, and Stanley *v.* The Chester and Birkenhead Rail. Co. ib. 58, and 9 Sim. 264, affirmed 3 M. & Cr. 773. Compare Aldred *v.* North Midland Rail. Co. 1 Ra. Ca. 404, where the terms of the agreement were held insufficient to preclude the company from doing what was complained of.

injunction to restrain the company from violating the agreement was granted both by Vice-Chancellor Shadwell and by Lord Cottenham, on appeal. Lord Cottenham, in the course of his judgment, said:—

"It cannot be denied that the act of Moss (the projector who signed the agreement) was the act of the projectors of the railway; it is therefore the agreement of the parties who were seeking an act of incorporation, that, *when incorporated, certain things should be done by them. But the question is, *not whether there be any* *binding contract at law, but, whether this Court will permit the company to use their powers under the act, in direct opposition to the arrangement made with the trustees prior to the act upon the faith of which they were permitted to obtain such powers.* If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this Court it would be otherwise. So here, as the company stand in the place of the projectors they cannot repudiate arrangements into which such projectors had entered; *they cannot exercise the powers given by Parliament to such projectors in their corporate capacity, and at the same time refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld.* The case of The East London Waterworks *v.* Bailey was cited to prove that, save in certain excepted cases, the agent of a corporation must, in order to bind the corporation, be authorized by a power of attorney; but it does not therefore follow that corporations are not to be affected by equities, whether created by contract or otherwise, affecting those to whose position they succeed, and affecting rights and property over which they claim to exercise control. What right have the company to meddle with the road at all? *The powers under the act give them right; but before that right was so conferred, it had been agreed that the right should only be used in a particular manner. Can the company exercise the right without regard to such agreement? I am clearly of opinion that they cannot.*"

*399 Lord Cottenham's reasoning.

The passages in Italics contain, as Lord Cottenham himself explained in a subsequent case (*x*), the true principle on which Edwards *v.* Grand Junction Railway Co. was decided, and is to be supported. In fact, the right of the plaintiff in these cases is not based upon the notion that there is any contract between him and the company, but upon the principle that as the company obtained the power to interfere with him upon certain

Theory of this case.

(*x*) Greenhalgh *v.* Manchester and Birmingham Rail. Co. 3 M. & Cr. 790, 791.

terms, it ought not to be allowed to exercise its powers to his prejudice in violation of those terms.

Doubts as to this case.

The propriety of this decision has, however, been questioned and denied more than once in the House of Lords on the ground that persons who take shares on the faith of a company's act of Parliament cannot be justly subjected to *400 any liabilities *not disclosed therein or contracted by the company after its formation. (*y*) At the same time, the decision itself has not been overruled; and although Lord Cottenham's reasoning would apply to all contracts, whether *ultra vires* or *intra vires*, and is open to objection on that account, yet as regards contracts of the latter class, the decision in Edwards *v.* The Grand Junction Railway Co. may, it is conceived, still be regarded as unimpeached. (*z*) This view is supported by the judgment of Lord Justices in Williams *v.* The St. George's Harbor Co. (*a*) There the promoters of a railway company had entered into an agreement with an owner of land through which the proposed railway was to pass, for the purchase of his land on certain terms. The landowner, who up to that time had opposed the scheme, agreed to withdraw, and he accordingly did withdraw his opposition. The company obtained its act, took the land in question, but declined to abide by the terms of the contract of sale; it had, however, so far recognized that contract, that it had allowed judgment in an action for its breach to be entered up against itself. This recognition of the contract was held sufficient to render it binding on the company, whatever might have been the case had there been no such recognition.

Williams *v.* St. George's Harbor Company.

Cases to which Edwards *v.* Grand Junction Railway Company does not apply.

It follows from the principle on which Edwards *v.* The Grand Junction Railway Co. was decided, that if the promoters of a company enter into an agreement with a person, and the company, after its formation, does not exercise its powers to his prejudice, he can no more

(*y*) See Preston *v.* Liverpool and Manchester Rail. Co. 5 H. L. C. 605; Caledonian and Dumbartonshire Rail. Co. *v.* The Magistrates of Helensburgh, 2 Macqueen, 391; Leominster Canal Co. *v.* Shrewsbury and Hereford Rail. Co. 3 K. & J. 654; Shrewsbury *v.* North Staffordshire Rail. Co. 1 Eq. 593, *infra*, p. 401.

(*z*) See Bedford Rail Co. *v.* Stanley, 2 J. & H. 746, where it was considered that the company was bound by the agreement sued upon. See, also, Lindsey *v.* The Great Northern Rail. Co. 10 Ha. 679.

(*a*) 2 DeG. & J. 547, varying the S. C. 24 Beav. 339.

enforce the agreement against the company on equitable than on legal grounds. This was all that was really decided by the House of Lords in Preston *v.* Liverpool, Manchester, &c., Railway Co. (*b*) There the company did *not take the plaintiff's land, and was therefore held not bound to pay for it, although the promoters had agreed to pay him a large sum for his land if he withdrew his opposition to their bill, which he did. The plaintiff had nothing but the agreement to rely upon, and even according to Edwards *v.* The Grand Junction Railway Co. this alone is not sufficient. (*c*)

*401

Preston *v.* Liverpool, &c., Railway Company.

Again, if the contract of the promoters is one which would be *ultra vires* if entered into by the company after its formation, such contract, even if ratified by the company when formed, cannot bind the company. For example, agreements by the promoters of a company that the company, when formed, shall apply its funds to purposes for which they are not subscribed, clearly do not bind the company. Nor can the principle of Edwards *v.* The Grand Junction Railway Co. be applied to agreements of this description. In The Earl of Shrewsbury *v.* North Staffordshire Railway Co. (*d*), an agreement was entered into first by the promoters of a railway company, and afterwards by the company itself, to pay a peer 20,000*l.* for his countenance and support in obtaining the company's act, and also to compensate him for such land as the company should take or injuriously affect. It was held that this agreement was *ultra vires* and could not be enforced against the company, although under its statutory powers it took land belonging to that peer. (*e*)

Agreements which are *ultra vires*.

Shrewsbury *v.* North Staffordshire Railway Company.

Agreements for withdrawal of opposition to bill in Parliament.

* The position of a company which amalgamates with another by agreement is analogous to that of a man who enenters into partnership with another. As the two partners do not become jointly liable to their respective separate creditors, and neither partner becomes liable to the debts

*402

Amalgamation of companies.

(*b*) 5 H. L. C. 605, affirming 17 Beav. 114. See the same case on demurrer, 1 Sim. N. S. 586.

(*c*) A similar observation applies to Caledonian, &c., Rail. Co. *v.* Magistrates of Helensborough, 2 Macqueen, 391.

(*d*) 1 Eq. 593, where all the cases were most carefully examined.

(*e*) This is by no means the only authority for saying that agreements by the promoters of a company, to the effect that the company shall pay a large sum of money in consideration of the with-

of his co-partner, so the two companies do not become jointly liable for each other's engagements, nor do the shareholders in the one company become debtors to the creditors of the other company. If the agreement to amalgamate is valid, it will bind the two companies as between themselves; but such an agreement will not *per se* give the creditors of either any *locus standi* against the other; and if the agreement to amalgamate is *ultra vires* and invalid as between the two companies, securities given by one company in respect of the debts of the other will be invalid also. (*h*)

Where companies are amalgamated by statute, special provision is always made with respect to these matters.

The principle of Edwards *v.* The Grand Junction Railway Co. (*i*) applies to the case of two companies amalgamating. The amalgamated company will not be allowed to exercise powers acquired by means of agreements with its component companies or their projectors, except upon the terms of complying with those agreements provided they are such as the amalgamated company would itself have been bound by if it had entered into them. (*k*)

Commencement of directors' power to bind the company.

Primâ facie, the power of the directors of a company to bind it commences at the date of its formation or of their appointment; but the commencement of that *403 power may be postponed *to a later period; and if it is, their previous acts will not bind

drawal of opposition to its bill in Parliament are altogether *ultra vires*. See Preston *v.* Liverpool, Manchester, etc., Rail. Co. 5 H. L. C. 605. The agreements in Petre *v.* Eastern Counties Rail. Co., 1 Ra. Ca. 642, and Stanley *v.* Chester and Birkenhead Rail. Co. ib. 58, and 9 Sim. 264, and 3 M. & Cr. 773, were of such an extravagant nature that they might well be held *ultra vires*. In the first of these cases 120,000*l.*, and in the latter 20,000*l.* were agreed to be paid for the withdrawal of opposition to a bill, and for compensation for the land which might be taken and injuriously affected. It does not, however, follow that such agreements are in any other respects illegal; and it seems that they are not, if the person withdrawing his opposition is personally interested in opposing the bill. See Simpson *v.* Lord Howden, 9 Cl. & Fin. 61; 10 A. & E. 793 and 807; 3 M. & Cr. 97.

(*h*) See *infra*, Termination of liability by substitution of debtors, the cases of the Era. Ass. Co. 2 J. & H. 400, and the Saxon Assurance Society, 2 J. & H. 408, and Ernest *v.* Nicholls, 6 H. L. C. 401.

(*i*) *Ante*, p. 398.

(*k*) See the Earl of Lindsey *v.* Great Northern Rail. Co. 10 Ha. 664; Preston *v.* Liverpool and Manchester Rail. Co. 1 Sim. N. S. 586, on demurrer; Stanley *v.* Chester and Birkenhead Rail. Co. 9 Sim. 264, and 3 M. & Cr. 773. See, also, Port of London Assur. Co.'s case, 4 DeG. M. & G. 465, reversed in 6 H. L. C. 401, on the ground that the amalgamation was altogether invalid.

the company to a person dealing with them with notice express or implied of their want of authority. (*l*)

2. Termination of Liability.

A. *In ordinary partnerships.*

When a partner's liability ends.

Before examining the circumstances which put an end to a partner's liability to creditors of the firm, it is necessary to draw attention to the distinction between a partner's liability for what may be done after his co-partners have ceased to be his agents, and his liability for what may have been done whilst their agency continued. It is obvious that there may be many circumstances which have no effect upon a liability already accrued, but which, nevertheless, may prevent any liability for what is not yet done from arising; and in order to determine with accuracy the events which put an end to a partner's liability to creditors, it is necessary to distinguish his liability for the future from his liability for the past.

(*a.*) *Termination of liability as to future acts.*

A partner's agency ends by notice.

The agency of each partner in an ordinary firm, and his consequent power to bind the firm, *i. e.* himself and his co-partners, may be determined by notice at any time during the continuance of the partnership (*m*); for his power to act for the firm is not a right attaching to him as partner independently of the will of his co-partners, and although any stipulations amongst the partners themselves will not affect non-partners who have not notice of them, yet if any person has notice that one member of the firm is not authorized to act for it, that person cannot hold the firm liable for anything done in the teeth of such notice. (*n*)[1]

(*l*) See Peirce *v.* Jersey Waterworks Co. L. R. 5 Ex. 209. Compare Touche *v.* Metropolitan Rail. &c. Co. 6 Ch. 671.

(*m*) See Vice *v.* Fleming, 1 Y. & J. 227; Willis *v.* Dyson, 1 Stark. 164; Rooth *v.* Quin, 7 Price, 193; Galway *v.* Mathew, 1 Camp. 402, and 10 East, 264.

(*n*) This subject has been already discussed, see *ante*, p. 327, *et seq.*

[1] When property was bailed to a partnership for no definite time, and the

*404 *With one or two exceptions, which will be mentioned presently, the agency of each partner and his consequent power to bind his co-partners, can only be effectually determined by giving notice of its revocation.[1] The authority imputed to each partner must continue until some event happens to put an end to it, and this event ought to be as generally known as that which conferred the authority upon him. The same reason which leads to the imputation of the power to act for the firm at all, demands that such power shall be imputed so long as it can be exercised and is not known to have been determined.

To this principle there are exceptions which may be conveniently disposed of before the principle itself and its application are discussed.

1. When a partner dies.[2] Notice of death is not requisite to prevent liability from attaching to the estate of a deceased partne, in respect of what may be done by his co-partners after his decease. (*o*)[3] For, by the law of England, the

Effect of death.

bailor could have removed it at his pleasure, one of the partners upon retiring from the partnership may give the bailor notice of his retiring and require him to remove the property, and absolve himself from any liability for loss of property occurring after his retirement. Winston *v.* Taylor, 28 Mo. 82. See *post*.

[1] See *post*, 407, and note.

[2] See *ante*, p. 231.

Contracts for the service of attorneys who are partners in business calling for professional skill, entitle the client to the service of each partner, and are determined by the death of either partner. McGill *v.* McGill, 2 Metc. (Ky.) 258.

The firm of T. & Co. contracted with M. for the manufacture of boilers. Before they were delivered, T., a member of the firm of T. & Co., died. The boilers were sent to the survivors of the firm, who continued the business in the old name, and they executed notes for the price in the old firm name. Subsequently the surviving partners purchased T.'s interest in the business, and afterwards made a general assignment for the benefit of creditors: *Held*, on a proceeding in chancery by M. against the administrators of T. and the surviving partners, to enforce the payment of his claim by the estate of T., that this was an indebtedness subsisting against the firm of T. & Co. in T.'s life-time, and contracted before the firm was dissolved by T.'s death, the notes executed by the survivors being mere evidence of the amount of the debt and the time of payment, and the debt existing independent of the notes, and that said indebtedness was a debt for which the separate estate of T. was responsible. Mason *v.* Tiffany, 45 Ill. 392.

(*o*) Devaynes *v.* Noble, Houlton's case, 1 Mer. 616; Johnes' case, ib. 619; Brice's case, ib. 620; Webster *v.* Webster, 3 Swanst. 490. See Vulliamy *v.* Noble, 3 Mer. 614; Brown *v.* Gordon, 16 Beav. 302, as to the power of surviving partners who are the executors of the deceased partner, to bind his estate.

[3] See Dickinson *v.* Dickinson, 25 Gratt. 321; Williams *v.* Mathews, 14 La. Ann. 11.

authority of an agent is determined by the death of his principal, whether the fact of death is known or not. (*p*)[4]

The death of one partner does not, however, determine an authority given by the firm through him before his death; and consequently, if after his death such an authority is acted on, the surviving partners will be liable for it. In Usher *v.* Dauncey (*q*), bills were drawn and endorsed in blank by a partner in the name of the firm, and were given by him to a clerk to be filled up and negotiated as occasion might require. The partner in question died, and after his death, and after the name of the firm had been altered, one of the bills was filled up and negotiated. Lord Ellenborough held that the bill was binding on the surviving partners, considering that the power to fill up the bill emanated from the partnership and not from the individual partner who had died.[5]

Usher *v.* Dauncey.

*Moreover, it does not follow that because a creditor has no remedy against the estate of a deceased partner, in respect of debts contracted by his co-partners since his death, his estate is not liable to contribute to such debts at the suit of the surviving partners. That is a different matter altogether, and depends on the agreement into which he entered with his co-partners, as will be seen hereafter, when the subject of winding up is under consideration. (*r*) *405

Contribution after death.

2. When a firm becomes bankrupt, the authority of each member to act for the firm at once determines.[1] If one partner only becomes bankrupt, his authority is at an end, and his estate cannot be made liable for the subsequent acts of his solvent co-partners. At the same time, if notwithstanding the bankruptcy of one partner, the others hold themselves out as still in partnership with him, they will be liable for his acts, as if he and they were partners (*s*); and although the estate of a bankrupt

Effect of bankruptcy.

(*p*) See Blades *v.* Free, 9 B. & C. 167; Smout *v.* Ilbery, 10 M. & W. 1; Companari *v.* Woodburn, 15 C. B. 400.

[4] See Ewell's Evans on Agency, *87 and note.

(*q*) 4 Camp. 97.

[5] See Bank of N. Y. *v.* Vanderhorst, 32 N. Y. 553; Wilson *v.* Stewart, 5 Pa. L. J. R. 450; Ewell's Evans on Agency, *87, note.

(*r*) For instances where the estate of a deceased shareholder has been held liable to contribute to debts incurred since his decease, see Baird's case, 5 Ch. 725; Blakeley's Executor's case, 3 Mc. & G. 726; Hamer's Devisees' case, 2 DeG. M. & G. 366.

[1] See Dickinson *v.* Dickinson, 25 Gratt. 321.

(*s*) See Lacy *v.* Woolcott, 2 Dowl. & Ry. 458.

partner does not incur liability for the acts of the other partners done since the bankruptcy, yet the solvent partners have power to bring the partnership transactions to an end, and to dispose of the partnership property. This subject will be examined hereafter in the chapter on Bankruptcy, to which the reader is therefore referred. (*t*)

Effect of retirement of dormant partner.

3. Another apparent but not real exception to the rule, is, that if a dormant partner (*i. e.*, one not known to be a partner)[1] (*u*) retires, the authority of his late partners to bind him ceases on his retirement, although no notice of it be given.[2] But this is because he never was known to be a partner at all, and the reason for the general rule has therefore no application to his case. The following decisions illustrate this exception: In Carter *v.* Whalley (*x*), the defendant Saunders was a partner in the "Plas Madoc Colliery Co.;" but *406 there was nothing to *show that the plaintiff or the public ever knew that such was the case. Saunders withdrew from the company, but no notice of his withdrawal was given either to the plaintiff or to the public. After his withdrawal, the company became indebted to the plaintiff, and it was held that Saunders was not liable for the debt, because the name of the company gave no information as to the parties composing it; and Saunders himself was not known either to the plaintiff or to the public to have belonged to the company before he withdrew.

Carter *v.* Whalley.

(*t*) See Fox *v.* Hanbury, Cowp. 445; Morgan *v.* Marquis, 9 Ex. 145.

[1] When there is an existing partnership under a fixed firm name, and a new partner is taken in, and there is no change in the firm name, the new partner is to be considered a dormant partner, unless it appears that his connection with the firm is, by publication or other acts, made known to the public. Phillips *v.* Nash, 47 Ga. 218.

Where two were concerned together in business, but the business was done in the name of one, and it was not generally known that they were partners: *Held*, that the other was a dormant partner. Kelley *v.* Hurlburt, 5 Cow. 534.

One who is a member of a partnership, trading under the firm name of R. M. & Co., does not become a dormant partner, by reason of the creditor being ignorant of the name of the co-partner of R. M. Deford *v.* Reynolds, 36 Pa. St. 325.

(*u*) A dormant partner, known to a few persons to be a partner, is not dormant as to them; see the cases cited *infra*, note (*g*)

[2] Kelley *v.* Hurlburt, 5 Cow. 534; Edwards *v.* McFall, 5 La. Ann. 167; Warren *v.* Ball, 37 Ill. 76; Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Magill *v.* Merrie, 5 B. Mon. 168; Deford *v.* Reynolds, 36 Pa. St. 325. See, however, Park *v.* Wooten, 35 Ala. 242.

(*x*) 1 B. & Ad. 11.

In Heath *v.* Sansom (*y*), the defendants Sansom and Evans carried on business as partners under the style of Philip Sansom & Co., but Evans was not known to be a partner. They dissolved partnership by mutual agreement, but did not notify the fact. After the dissolution, Sansom gave the plaintiff a promissory note, on which he sued Sansom and Evans. The Court decided that Evans was not liable, for when his right to share profits ceased, he could not be held responsible for the subsequent acts of his co-partner, unless he authorized those acts, or held himself out as still connected with him; and he had done neither. (*z*)

Heath *v.* Sansom.

With the three exceptions which have been noticed, the general proposition above stated holds good. Thus, if a partner becomes lunatic, and his lunacy is not apparent or made known, his power to bind the firm and his liability for the acts of his co-partners (*a*) will remain unaffected.

Effect of lunacy.

So, if a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force, although as between the partners themselves a dissolution or a retirement is a revocation of the authority of *each to act for the others. (*b*)[1] Thus, if a *407 known partner retires, and no notice is given, he will be lia-

Effect of dissolution of which no notice is given.

(*y*) 4 B. & Ad. 172.

(*z*) See, too, Evans *v.* Drummond, 4 Esp. 89. This doctrine seems not to apply to Scotland, see Hay *v.* Mair, 3 Ross, L. C. on Com. Law, 639. The case of The Western Bank of Scotland *v.* Needell, 1 Fos. & Fin. 461, seems at first sight opposed to the authorities in the text; but it is conceived that in that case there must have been evidence to show that the defendant was known to the plaintiffs to have been a partner before he retired.

(*a*) See Moulton *v.* Camroux, 2 Ex. 487, and 4 ib. 17; and Baxter *v.* The Earl of Portsmouth, 5 B. & C. 170, and the cases cited *ante*, p. 224, &c., to show that the lunacy of one partner does not dissolve the firm. See further on this subject, Story on Agency, § 481, and note there.

(*b*) See Mulford *v.* Griffin, 1 Fos. & Fin. 145; Faldo *v.* Griffin, ib. 147, and the cases in the next note.

[1] Tabb *v.* Gist, 1 Brock. 33; Southwick *v.* McGovern, 28 Iowa, 533; Bradley *v.* Camp, Kirby, 77; Kennedy *v.* Bohannon, 11 B. Mon. 118; Amidown *v.* Osgood, 24 Vt. 278; Lamb *v.* Singleton, 2 Brev. 490; Heroy *v.* Van Pelt, 4 Bosw. 60; Schurten *v.* Davis, 21 La. Ann. 173; Dickinson *v.* Dickinson, 25 Gratt. 321; Southern *v.* Grim, 67 Ill. 106; Howell *v.* Adams 68 N. Y. 314; Benjamin *v.* Covert, 2 N. W. Rep. N. S. 625; Buffalo City Bank *v.* Howard, 35 N. Y. 500; Hunt *v.* Hall, 8 Ind. 215; Newcomet *v.* Brotzman, 69 Pa. St. 185; Price *v.* Towsey, 3 Litt. 423; Ketcham *v.* Clarke, 6 Johns. 144; Merrit *v.* Pollys, 16 B. Mon. 355; Grady *v.* Robison, 28 Ala. 289; Spears *v.* Toland, 1 A. K.

ble to be sued in respect of a promissory note made since his retirement by his late partner, even though the plaintiff had no dealings with the firm before the making of the note (*c*). And in determining which was first in point of time, viz., notice of the

Marsh. 203; Thurston *v.* Perkins, 7 Mo. 29; Princeton, etc. Turnpike Co. *v.* Gulick, 16 N. J. L. 161; Bernard *v.* Torance, 5 Gill & J. 383. See, also, Woodruff *v.* King, 47 Wis. 261.

See, however, Brisban *v.* Boyd, 4 Paige, 17, where it was held that a contract by a customer of a partnership with one of the partners, on account of the firm, after a dissolution, but without notice of the dissolution, will not bind the firm, unless, by the avoidance of the contract, the customer would suffer a loss, or be put in a worse situation than he would have been in had he been advised of the dissolution before making the contract.

Where one of three partners retires from, or a new partner comes into the firm, or both, and notice thereof is given, but the business continues to be carried on in other respects as before, those partners as to whom no notice was given, will be presumed to hold the same relation to the concern afterwards that they did before. Howe *v.* Thayer, 17 Pick. 91.

To establish the liability as partners of defendants who have dissolved partnership, it must appear: 1, that the plaintiff, at the time the contract was made under which his account accrued, knew that the defendants had been in partnership; 2, that he was ignorant of their dissolution; and 3, that he made the contract supposing he was contracting with the defendants as partners, and in reliance upon their joint liability. Pratt *v.* Page, 32 Vt. 13; Benton *v.* Chamberlain, 23 Vt. 711.

After dissolution and notice, the power of each to bind the others ceases: See the cases already cited; also Crowly *v.* Bank of Ky. 18 B. Mon. 405; Whitesides *v.* Lee, 1 Scam. 548; Lane *v.* Tyler, 48 Me. 252.

A bill of exchange drawn by a partnership and sent to an agent for sale, but sold after notice to the agent and the purchaser that one partner has retired, binds the remaining partner only. Robb *v.* Mudge, 14 Gray, 534.

The principle that, after a partnership is dissolved, one partner, dealing with a person who has no notice of the dissolution, may bind his co-partner, applies only to transactions in the usual course of business. Whitman *v.* Leonard, 3 Pick. 177.

In 1861 the firm of Phelps & Kingman executed and delivered to the City Bank of Poughkeepsie the following paper: "We hold ourselves responsible for the payment of any sum, not to exceed five thousand dollars ($5,000), Mr. C. H. Woodruff may receive of your bank for legitimate business purposes." *Held*, that the guaranty was a continuing one. In 1863 the firm dissolved, and in 1875 notice thereof was given to the bank: *Held*, that the guaranty covered all advances made prior to notice of the dissolution, but that neither the firm nor the partners individually were liable for advances subsequently made. Under such guaranty the signers were liable

(*c*) See Parkin *v.* Carruthers, 3 Esp. 248; Williams *v.* Keats, 2 Stark. 290; Brown *v.* Leonard, 2 Chitty, 120; Dolman *v.* Orchard, 2 C. & P. 104, in which three last cases, however, there was a continual holding out. See, as to ordering such a bill to be delivered up, Ryan *v.* Mackmath, 3 Bro. C. C. 15.

dissolution or the making of the note, effect must be given to the presumption that the instrument was made and issued on the day it bore date, unless some reason to the contrary can be shown. (*d*)

Anderson v. Weston.

In Anderson *v.* Weston, a firm was dissolved on the 29th of Dec., 1837, and a bill dated the 2d Feb., 1838,

for all notes discounted within six years prior to the commencement of the action, whether to renew old notes or otherwise. City Natl. Bank *v.* Phelps, 16 Hun, 158.

A, a stage proprietor, engaged B to board a person in A's employment. Afterwards A sold half his interest in the stage property to C, and A and C became partners. The person so in the employment of A continued in the employment of the partners, and continued to board with B; but no notice was given to B of the terms of said partnership, nor was B informed by A that he should not pay such person's board after the formation of said partnership: *Held*, that B might recover against A after the formation of the partnership as well as before. Taggart *v.* Phelps, 10 Vt. 318.

A party after his withdrawal from a firm, suffered his name to appear in the firm name for some time after his withdrawal, and his name appeared before his withdrawal in the business card of the firm, published in a newspaper, to which he was a subscriber. It appeared he had admitted that he still had an interest in the firm, and that his name was used as before, and that he was liable to the same extent he had been. He continued for more than a year after his withdrawal at his place in the firm. No notice of dissolution was given: *Held*, that, from these facts, the jury were fully warranted in finding him liable as a member of the firm. Ellis *v.* Bronson, 40 Ill. 455.

After the dissolution of a firm, and on assignment of its property, a debtor settled with one of the partners, without actual notice of the assignment: *Held*, that the settlement was binding on the assignee, because one partner has authority to settle firm debts, after dissolution, in the absence of an agreement to the contrary known to the debtor; and because the dissolution was not sufficient to put the debtor on inquiry as to whether there was any such agreement or any assignment. Huntington *v.* Potter, 32 Barb. 300.

One member of a firm, without the knowledge of his partner, signed a draft with the partnership name, and delivered it to a third party for his accommodation. The latter filled in his own name as payee, and that of his own firm as drawees, in the presence of the plaintiff, and having indorsed it, procured it to be discounted by the plaintiff: *Held*, that the plaintiff was not chargeable with notice that it was accommodation paper, and that the partner of the drawee was liable, although, in fact, the firm had been dissolved a short time before. No notice of such dissolution had come to the plaintiff. Chemung, etc. Bank *v.* Bradner, 44 N. Y. 680.

A firm doing business in A was dissolved, but no notice of the dissolution was published in a newspaper. About the time of the dissolution, B, a member or the firm, gave a note in the name of the firm to a bank at C, which note was, after the dissolution, renewed by an agent acting under a sealed power of attorney given by B in the name of the firm: *Held*, that the notice of the dissolution was insufficient, so far as the

(*d*) See Anderson *v.* Weston 6 Bing. N. C. 296.

was drawn and indorsed by one partner in the name of the late firm; but when he indorsed it did not exactly appear. Notice of dissolution was given by advertisement in the "Gazette" on the 20th March, 1838. It was held that, in the absence of evidence to the bank at C was concerned; that the firm were liable on the note, whether given before or after the dissolution; that, if the renewal was void, the bank had the right to recover on the original note, which it had retained; that an assignee of the firm, for the payment of the debts thereof, had properly paid this debt to the bank, although he, the assignee, may have had the requisite notice of the dissolution, and that the debt was contracted afterwards. Hammond *v.* Aiken, 3 Rich. Eq. 119.

Two partners in a mill and cotton factory in a small town, dissolved their partnership, and posted up written notices of the dissolution in four or five places in the town. Soon after, one of the partners gave a note in the name of the firm, to a bank in a town twelve miles distant: *Held*, that the court could not say that the notice was sufficient, nor disturb a verdict for the bank, which implied a finding that it was insufficient, as being contrary to evidence. Mitchum *v.* Bank of Kentucky, 9 Dana, 166.

A brought an action as indorsee on a note made in October, 1836, in renewal of a note made in July, 1834, by the firm of B and C. B had formed a partnership with D in January, 1834, but the new firm retained the books of B and C, and collected their debts: *Held*, that the liability of a member of the firm to pay the note depended on their partnership when the first note was given; that to show their dissolution, so as to take away B's rights, some notice to A must be clearly proven; that the fact of forming a new connection when the new firm occupied the old store, and used the old firm's books and collected their debts, was not sufficient evidence of a dissolution, as the old firm might have been continued for the purpose of settling its affairs. Brown *v.* Clark, 14 Pa. St. 469.

A partnership in Mobile, Ala., was broken up by violence, which was notorious, and public notice of the dissolution was given. The following year one of the partners set up business under the same firm name, which indicated by name only himself, in Milwaukee, and dealt with persons in New York who had formerly dealt with the old firm in Mobile; upon one of his notes, these New York dealers strove to hold his former partners in Mobile liable: *Held*, that the circumstances of the case were such as to put the New York dealers upon their inquiry, and that they could not be allowed to hold the defendant. Clapp *v.* Upson, 12 Wis. 492.

Where a note was signed by one of the members of a commercial firm, with the addition of the words "in liquidation:" *Held*, that such a note was a notice to the payee that the firm was dissolved, and that, without a special authorization to the partner signing the note from his co-partner, the note was not binding on him. Speake *v.* Barrett, 13 La. Ann. 479.

Where the plaintiffs, who were lawyers, drew a writ in favor of three persons, who had been partners, describing one of them as late partner of a certain firm: *Held*, that this was sufficient proof that the plaintiffs, at the time of the drawing of the writ, knew that the one described as late partner had ceased to be a member of the firm. Cahoon *v.* Hobart, 38 Vt. 244.

Notice of dissolution of a partnership may be shown either by direct or circumstantial evidence, sufficient to es-

contrary, the bill must be taken to have been drawn on the day it bore date, and that the time of its indorsement was a matter to be inferred by the jury from all the circumstances of the case. The

tablish the fact that the person seeking to enforce the partnership liability knew of the dissolution. Laird *v.* Ivens, 45 Tex. 622. See, also, Lovejoy *v.* Spafford, 93 U. S. 430; Coddington *v.* Hunt, 6 Hill, 595; Mauldin *v.* Branch Bank, 2 Ala. 502.

Circumstances, such as leave no rational doubt on the mind that one knew of the dissolution of a partnership, are as satisfactory as direct and positive proof. Irby *v.* Vining, 2 McCord, 379.

See, however, Pitcher *v.* Barrows, 17 Pick. 361, where it was held that where notice of the dissolution of a partnership has not been published in a newspaper, or brought home to the knowledge of the party to be affected by it, evidence of the mere notoriety of the dissolution is not admissible to prove such notice.

Where it is material to know the exact time of the dissolution of a firm, evidence that one had notice of such dissolution at a certain time is not admissible. Shaffer *v.* Snyder, 7 Serg. & R. 503.

A partnership to expire in January, appointed an attorney to "buy and sell goods, sign notes, and perform all acts concerning the business:" *Held*, that one having notice at the beginning of the partnership of the time of ending, could not charge the firm with goods sold to the attorney after the expiration. The dissolution was a revocation. Schalter *v.* Winpenny, 75 Pa. St. 321.

A person who takes a partnership note, knowing that the partnership articles provide for its dissolution in case of the withdrawal of the capital, is put upon inquiry as to whether such dissolution has taken place. Smith *v.* Vanderburg, 46 Ill. 34.

In an action to charge two defendants as partners with the payment of plaintiff's services in running a shingle mill previously owned by both as a firm, but then belonging to one only, reports of a scaler employed by plaintiff, wherein the mill is described by the name of the one defendant alone, and which were made for the purpose of enabling the plaintiff to settle with the boom company for boom charges, are admissible in evidence as tending to show notice to plaintiff that the mill business was being carried on on such defendant's individual account, and not, as formerly, by the firm. Robinson *v.* Warden, 33 Mich. 316.

The mailing of a notice of dissolution, properly directed to the party sought to be charged with such notice, is not sufficient alone to relieve the retiring partner; it raises a presumption of notice, but one which may be repelled by proof that the notice was not in fact received. Austin v. Holland, 69 N. Y. 571.

If a partnership note has been given, payable on demand, to the order of one of the firm, and indorsed by him, a retiring partner cannot defend an action thereon, brought by the indorsee against him and his late partners, by proof of the execution, by them and his successor in the firm, of a bond to him to pay all the debts and liabilities of the late firm. Richards *v.* Fisher, 2 Allen, 527.

Notice of dissolution is necessary where the outgoing partner holds himself out as the representative of the firm, but not where he acts exclusively for himself. Taylor *v.* Young, 3 Watts, 339.

A member of a firm who retired therefrom without publishing notice of the dissolution, is not liable on a note signed in the firm name by another member, and given to a new customer 11 years

jury found that it was indorsed before the 20th of March, 1838, and the holder of the bill was consequently held entitled to a verdict against all the members of the dissolved firm. (*e*)

Torts after dissolution.

So, a partner who retires and does not give sufficient notice, is liable to be sued for torts committed subsequently to his retirement by his late co-partners or their agents. (*f*)

Case of dormant partner.

Moreover, if a dormant partner is known to certain individuals to have been a partner, he is as to them no longer in the situation of a dormant partner, and must therefore give them notice of his retirement, if he would free himself from *liability in respect of the future transactions between them and his late partners. (*g*)[1]

*408

Importance of notifying dissolution.

It is obvious, therefore, that on the dissolution of a firm or the retirement of a partner, it is of the greatest importance to notify the fact; and each partner has a right to

after the retirement. Farmers' etc. Bank *v.* Green, 30 N. J. L. 316.

Persons having no knowledge of a partnership are not entitled to notice of its dissolution. Chamberlain *v.* Dow, 10 Mich. 319.

(*e*) *Ibid.*

(*f*) Stables *v.* Eley, 1 Car. & P. 614.

(*g*) Farrar *v.* Deflime, 1 Car. & K. 580. See, too, Evans *v.* Drummond, 4 Esp. 89, and Carter *v.* Whalley, 1 B. & Ad. 14.

[1] The duty of a retiring dormant partner to give notice of the dissolution of the partnership, is a duty which he owes to those who, before that time, had some knowledge of his connection with the firm. To strangers, having no such knowledge, he owes no such duty; as to them he can only be charged as a partner, when in fact he was not, by showing that he in some way misled them, as, that he held himself out to the world as such, or that he so held himself out to them. Nussbaumer *v.* Becker, 87 Ill. 281; Cregler *v.* Durham, 9 Ind. 375.

A partner whose name has not appeared in the firm, will be liable to persons dealing with the partnership after his retirement from it, if he was known to such persons as a member of the firm, either by direct transactions or public notoriety, and they have not been notified of the dissolution of the connection. Davis *v.* Allen, 3 N. Y. 168.

B. having been a dormant partner with T., under the style of "The Atlantic Forge Company," the firm was dissolved, and a new firm was formed by T. with a third person, under a different name, to conduct the same business, at the same place; and the new firm sent notice by mail to all persons who had transacted business with the old firm. A person, who had never dealt with the old firm, sold goods nominally to T., and took the note of the new firm therefor. The jury found that the dissolution and formation of the new firm were matters of public notoriety: *Held* that the retiring partner was not liable for the goods so sold, although the vendor, at the time of the sale, supposed him still to be a partner. Holdane *v.* Butterworth, 5 Bosw. N. Y. 1.

notify it. If his co-partners prevent him from exercising that right, they will be compelled to do what may be necessary to enable notice to be given. In Troughton v. Hunter (*h*), a partnership was dissolved by a decree of the Court. It appeared that no advertisement of the dissolution would be inserted in the "Gazette," unless signed by both partners. The defendant, who it seems would not sign the advertisement, was ordered so to do by the Court.

Each partner has a right to notify it.

Troughton v. Hunter.

Effect of notice of dissolution.—Subject to two exceptions, which will be examined hereafter, notice of dissolution of a firm, or the retirement of a partner, duly given, determines the power previously possessed by each partner to bind the others. Hence, after the dissolution of a firm or the retirement of a member and notification of the fact, no member of the previously existing firm is, by virtue of his connection therewith, liable for goods supplied to any of his late partners subsequently to the notification (*i*); nor is he liable on bills or notes subsequently drawn, accepted, or indorsed by any of them in the name of the late firm (*k*); even although they may have been dated before the dissolution (*l*); or have been given for a debt previously owing from the firm (*m*) by the partner expressly authorized to get in and discharge its debts. (*n*)[1]

Effect of notice of dissolution.

There are, it is true, cases to be met with in which, notwithstanding a dissolution and notice, a bill or note in the name of the firm has been held to bind those who were mem-

Cases in which notice is immaterial.

(*h*) 18 Beav. 470.

(*i*) Minnitt *v.* Whinery, 5 Bro. P. C. 489.

(*k*) Paterson *v.* Zachariah, 1 Stark. 375; Abel *v.* Sutton, 3 Esp. 108; Spenceley *v.* Greenwood, 1 Fos. & Fin. 297.

(*l*) Wrightson *v.* Pullan, 1 Stark. 375; S. C. Wright *v.* Pulham, 2 Chitty, 121.

(*m*) Kilgour *v.* Finlyson, 1 H. Blacks. 156; Dolman *v.* Orchard, 2 Car. & P. 104.

(*n*) Kilgour *v.* Finlyson, 1 H. Blacks. 156. See Lewis *v.* Reilly, *infra*, note (*q*)

[1] As a general rule, after a dissolution of a partnership, neither partner can make a new contract or incur new responsibilities in the firm name binding on the others without express authority; and no note, draft or acceptance so executed in the name of the firm will be valid, if the party with whom the contract is made had notice of the dissolution. Easter *v.* Farmers' Nat. Bank, 57 Ill. 215; Curry *v.* White, 51 Cal. 530; Brown *v.* Broach, 52 Miss. 536; Maxey *v.* Strong, 53 Miss. 280; Smith *v.* Shelden, 35 Mich. 42; Floyd *v.* Miller, 61 Ind. 225; Bacon *v.* Hutchings, 5 Bush, 595; Montague *v.* Reakert, 6 id. 393; Gale *v.* Miller, 1 Lans. 451; Whitworth *v.* Ballard, 56 Ind. 279; Meyer *v.* Atkins, 29 La. Ann. 586; Vaccaro *v.* Toof, 9 Heisk. 194.

*409 bers thereof *prior to the dissolution; but in each of these cases there was some circumstance taking it out of the ordinary rule. In Burton *v.* Issitt (*o*), the continuing partner had authority to use the name of the retired partner in the prosecution of all suits for the recovery of partnership property. This was held to authorize the giving of a promissory note for sixpences, payable under the Lords' act, and the retired partner was therefore held bound by a note given by his late partner in payment of those sixpences. In Smith *v.* Winter (*p*), the continuing partner had express permission to use the name of his late partner, who was therefore justly held

Burton v. Issitt.

Smith v. Winter.

Where one of two co-partners, after the dissolution of the partnership, gave a note in the name of the firm for his own private debt, the creditor knowing that the partnership was dissolved; and this note being afterwards sued, and the party who made it having become bankrupt, the other partner compromised the suit by giving his own note for half the debt and all the cost, part of which note he afterwards voluntarily paid: *Held*, that the making and acceptance of the first note was a fraud upon the absent partner; and that the second note was therefore void. Stearns *v.* Burnham, 4 Me. 84.

To charge one partner on a firm note made by another partner without special authority, after the dissolution of the firm, a ratification with knowledge of the facts must be shown. McElroy *v.* Melear, 7 Coldw. 140.

After dissolution, only the liquidating partner may, without express authority from his fellows, borrow money to pay a firm debt and give a firm note for it. McCowin *v.* Cubbison, 72 Pa. St. 358.

A promissory note executed in the name of a commercial firm, and signed "John Bishop & Co. in liquidation," by an agent of one of the former partners, after the dissolution of the firm, is not binding on the former members who have not given any specific authority for the execution of the note. Dodd *v.* Bishop, 30 La. An. 1178.

A declaration, alleging that a note was made in the name of the firm by one of the partners after a dissolution, unless for the purpose of settlement, and given for a pre-existing debt of the firm, does not show a partnership liability, but does show the liability of the partner making the note in his separate capacity. Fontaine *v.* Lee, 6 Ala. 889.

It has been held that a partner after dissolution of the firm, with notice to its creditors, cannot renew a partnership note of his late partnership. Moore *v.* Lackman, 52 Mo. 323. See, also, Haddock *v.* Crocheron, 32 Tex. 276. See, however, Taylor *v.* Hill, 36 Md. 494.

But when, in the advertisement of the dissolution of a co-partnership, power is given to the continuing partner to settle the business of the firm, and for that purpose to use the partnership name, the jury may infer, from the transactions of trade, and the usage and custom of merchants, as well as from the advertisement itself, whether this power extends to the signing of the partnership name to renewals of a note which had been discounted in bank previous to the dissolution; and it is not necessary that the authority should be given by a special power of attorney, or other writ-

(*o*) 5 B. & A. 267.

(*p*) 4 M. & W. 454.

liable on a bill given in the name of the old firm after his retirement. The only case, indeed, of this description which presents any difficulty is Lewis *v.* Reilly. (*q*) There two partners drew a bill payable to their own order, and afterwards dissolved partnership. One of them then indorsed the bill in the name of both to the plaintiff, who knew of the dissolution. It was held, in an action by him against both partners, that he was entitled to recover on the bill, and that it was immaterial whether he knew of the dissolution or not. The precise ground of this decision does not distinctly appear. The Court seems to have proceeded on the supposition that an indorsement by one of several payees in the name of all is sufficient; but the writer has been un-

Lewis v. Reilly.

ten instrument. Myers *v.* Huggins, 1 Strobh. 473.

Where a partner, after the partnership had been dissolved by the absconding of his co-partner, gave a note in the name of the firm, payable on demand, in lieu of a note given by the firm which had not become payable, with a view to enable the creditor to secure his debt by an attachment of property: *Held*, that the other partner was not bound by the transaction, because the giving of the new note was not in the usual course of dealing, and that the attachment was void as to other creditors. Whitman *v.* Leonard, 3 Pick. 177.

A partner drew a check in the name of his firm, retained it in his possession, and after the dissolution of the firm transferred it to a creditor, in payment of his individual indebtedness. In an action brought by the latter thereon: *Held*, that after the dissolution of the firm one partner could not, by transferring a check previously signed, create a liability against it. Gale *v.* Miller, 54 N. Y. 536.

After the dissolution of a partnership, a note made in the firm name, with the assent of the partners, for a debt due by the firm, is a valid obligation. The debt due by the firm, particularly when an extension of the time of its payment is secured by giving the note, is a sufficient consideration therefor. Randolph *v.* Peck, 1 Hun, 138.

Written authority to one of the partners to use the firm name after the partnership is dissolved, so as to be binding on all, is not required; it may be given by parol. Easter *v.* Farmers' Nat. Bank, 57 Ill. 215.

The mere fact, however, that the other partners have for some reason paid certain other notes executed by him in the firm name after dissolution, is not of itself sufficient evidence of authority in such partner to execute the note in question. Easter *v.* Farmers' Nat. Bank, *supra*.

An authority to one of a partnership, to settle the affairs, receive and pay the debts, does not warrant his drawing a bill, or giving a note in the partnership name after dissolution of the firm. Martin *v.* Walton, 1 McCord, 16; Bank of S. C. v. Humphreys, Id. 388.

Where one of the surviving members of a partnership answered under oath to a suit upon a due-bill signed in the firm name, denying its execution and the existence of such a firm, a reply that after its execution he ratified the act of his partner in signing it, was *held* to be good on demurrer. Pattison *v.* Norris, 29 Ind. 165.

(*q*) 1 Q. B. 349.

able to find any previous authority for such a doctrine, save where the indorsers are partners, which in the case in question they were not, as the plaintiff was found by the jury to have known. The case is certainly anomalous and requires reconsideration. (*r*)

The exceptions alluded to above as qualifying the rule that the agency of each partner is determined by dissolution (or retirement) and notice are—

When a partner continues to hold himself out.

First, where a partner who has retired and notified his retirement, nevertheless continues to hold himself out as a partner; and secondly, where what is done only carries out what was begun before.

*410 *1. If a partner retires and gives notice of his retirement, and he nevertheless allows his name to be used as if he were still a partner, he will continue to incur liability on the principle of holding out, explained in an earlier part of of this treatise.[1] In

Williams v. Keats.

Williams *v.* Keats (*s*), after a partner had retired, and after notice thereof had been given by advertisement, a

(*r*) See Story on Bills, § 197, and Abel *v.* Sutton, 3 Esp. 108. The cases go further than is suggested in Garland *v.* Jacomb, L. R. 8 Ex. 220, for the notice of dissolution is what creates the difficulty. See *infra*, p. 413, note. (*i*)

(*s*) 2 Stark. 290. See, too, Dolman *v.* Orchard, 2 Car. & P. 104; Emmet *v.* Bradley, 7 Taunt. 600.

[1] Where the relations of a partner to his co-partners, have been terminated, yet his name was continued in the name and style of the firm formed by his former co-partners, with his knowledge, sanction and approval: *Held*, that he was liable on the contracts and obligations of the firm so using his name, as if he had actually continued as a member and partner thereof. Freeman *v.* Falconer, 44 N. Y. Sup. Ct. (12 Jones & Sp.) 132. See, also, Ellis *v.* Bronson, 40 Ill. 455; Speer *v.* Bishop, 24 Ohio St. 598.

A retiring partner, who gives notice by publication in a newspaper that he has ceased to be a partner, but who after that allows his name to appear in the firm as a partner, and continues in its employment, is liable as a partner to one who deals with the firm, and is misled by the appearances, and has no notice that he is not a partner, although the fact is generally known at the place where the contract is made. Wait *v.* Brewster, 31 Vt. 516.

It is competent in an action against a partnership, to show that notwithstanding the withdrawal of a partner and a change of the firm name, the partnership had remained practically the same, and the business was conducted by the same persons, both before and after the withdrawal and change. Mellinger *v.* Parsons, 51 Iowa, 58.

The mere fact that a partnership name has been kept over the door after the dissolution of the partnership, is not of itself sufficient to authorize one who holds a note signed in the partnership name, to recover upon it. Boyd *v.* McCann, 10 Md. 118.

Two surviving partners publish notice "that the business of the late firm will for the present be carried on in the same name, under the charge of J. H.," (one of the partners), "who will con-

bill was accepted by his co-partner in the names of himself and late partner. The names of both still remained painted up over their late place of business, and Lord Ellenborough held that the partner who had retired was liable on this bill notwithstanding the advertisement; for there was no evidence to show that the plaintiff in fact knew of the dissolution. (*t*) Upon this, however, it is to be observed that the only evidence that the retired partner authorized the continued use of his name, was the fact that he had not prevented it. Now, authorities are not wanting to show that if a partner retires, and notice of his retirement is given by advertisement, he will not continue to incur liability by the acts of his co-partners, simply because they continue to carry on business in the old name, and he does not take steps to stop them. (*u*) His forbearance in this respect does not necessarily amount to an authority to use his name as before; and unless his name is used by his authority he is not liable on the ground that he holds himself out as a partner. (*x*) But although it may be doubtful whether in Williams *v.* Keats there was a sufficient holding out, it is clear that if a partner retires and does still hold himself out as a partner, this is in fact signifying that he is willing to incur the responsibilities of a partner for the sake of those with whom his name is associated; and therefore he

Effect of not preventing use of name.

Principle of Williams *v.* Keats correct.

tinue, and who is duly authorized to adjust and settle matters relative to the same:" *Held*, that the surviving partners held out to the world that they would continue to transact business under that name, and that a note given by J. H. in the name of the firm was binding upon both. Casco Bank *v.* Hills, 16 Me. 155.

The members of a firm, in the publication of notice of their dissolution, used the following language: "Either of the parties are authorized to use the name of the firm in liquidation only of past business:" *Held*, that this did not authorize the parties to renew a note given by the firm for a partnership debt, nor confer upon any of the parties powers which they did not possess by law. Martin *v.* Kirk, 2 Humph. 529.

A co-partnership was incorporated, and transferred their property to the corporation, and, by a by-law, the business was to be carried on in the name of the co-partnership: *Held*, that, though the partnership was thus dissolved, the members were liable as partners upon contracts subsequently made with third persons having no notice of the dissolution. Goddard *v.* Pratt, 16 Pick. 412.

(*t*) See, as to this, Brown *v.* Leonard, 2 Chitty, 120, *infra*.

(*u*) See Newsome *v.* Coles, 2 Camp. 617.

(*x*) As to a retiring partner's right to an injunction to restrain the continuing partners from carrying on business in the old name, see De Tastet *v.* Bordenave, Jac. 516; Webster *v.* Webster, 3 Swanst. 490, note; Lewis *v.* Langdon, 7 Sim. 421.

will continue to be answerable for their conduct, even to persons dealing with them with knowledge of his retirement. This was decided in Brown *v.* Leonard (*y*), in which the

Brown v. Leonard.

*411 plaintiff sued on a *promissory note made in the name of Spring, Leonard, and Bush. Before the note was made, Bush had retired from the firm, and the plaintiff, before he took the note, was told by Bush that he had ceased to be a partner with Leonard and Spring, but that his name was to continue for a certain time. Bush was held liable on the note; for, notwithstanding his retirement, his name was continued, and with it his responsibility. (*z*)

The same principle was acted on in Stables *v.* Eley, (*a*) in which a retired partner, whose name was still on a cart, and over the old place of business, was held liable for the negligence of the driver of the cart.

Stables v. Eley.

2. It is said that a firm, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business. (*b*) This doctrine requires consideration. No doubt after, as well as before dissolution, each partner can pay, or receive payment of, a partnership debt; for it is clearly settled that payment by one of several joint debtors, or to one of several joint creditors (*c*), extinguishes the debt irrespectively of any question of partnership. So, again, as regards dealing with the partnership assets, it has been frequently held that the power of a continuing or surviving partner to sell partnership goods is as extensive as that of a partner in a going concern. (*d*) But when questions of a different sort arise,

Agency continuing for purposes of winding up.

*412 considerable difficulty is experienced, and this *difficulty is rather increased than diminished by the loose statement,

(*y*) 2 Chitty, 120.

(*z*) Bush, however, seems to have undertaken that the notes should be provided for. See the judgment.

(*a*) 1 Car. & P. 614.

(*b*) *Ex parte* Williams, 11 Ves. 5; Peacock *v.* Peacock, 16 ib. 57; Crawshay *v.* Collins, 15 Ves. 227, and 2 Russ. 342; Wilson *v.* Greenwood, 1 Swanst. 480; Crawshay *v.* Maule, ib. 507; Butchart *v.* Dresser, 4 DeG. M. & G. 542. N. B.—The *dicta* of Lord Eldon were not made in any case in which the power of one partner to bind the others after a dissolution was before him for decision.

(*c*) *I. e.* if they are not trustees. Payment to one of several trustees is no discharge. Webb *v.* Ledsam, 1 K. & J. 385.

(*d*) See Fox *v.* Hanbury, Cowp. 445; Smith *v.* Stokes, 1 East, 363; Smith *v.* Oriell, ib. 368; Harvey *v.* Crickett, 5 M. & S. 336; Morgan *v.* Marquis, 9 Ex. 145; Butchart *v.* Dresser, 4 DeG. M. & G. 542. Whether this is the result of the

that a partnership which is dissolved is nevertheless deemed to continue so far as may be necessary for winding up its affairs.[1]

doctrines of agency, or of the technical rule, that one tenant in common could not maintain trover against another, is perhaps even yet scarcely settled. This subject will be noticed hereafter.

[1] Generally a dissolution of a partnership leaves every partner in possession of the full power (unless upon the dissolution it has been exclusively confided and delegated to some other partner or person) to adjust and settle its affairs, to pay and collect debts due to the partnership; to apply the partnership funds and effects to the discharge of the partnership debts; to adjust and settle the unliquidated debts of the partnership; to receive any property belonging to the partnership; to make due acquittances, discharges, receipts and acknowledgments of their acts in the premises, and to divide the proceeds of the partnership property among the parties entitled thereto. Ruffner *v.* Hewett, 7 W. Va. 585; Robbins *v.* Fuller, 24 N. Y. 570; Heart *v.* Walsh, 75 Ill. 200; Nickels *v.* Mooring, 16 Fla. 76; Riddle *v.* Etting, 32 Penn. St. 412; Ward *v.* Barber, 1 E. D. Smith, 423; Granger *v.* McGilvra, 24 Ill. 152; Mayor *v.* Hawkes, 12 Ill. 298; Gannett *v.* Cunningham, 34 Me. 56; Milliken *v.* Loring, 37 Me. 408; Dowry *v.* Roberts, 2 Md. Ch. 157; Hall *v.* Clagett, 48 Md. 225.

The statute of Missouri, regulating the administration of partnership estates, does not prohibit a surviving partner from winding up and settling the partnership concerns, unless he first gives bond with security for the faithful discharge of his duties. Bredow *v.* Mutual Savings Institution, 28 Mo. 181.

A solvent partner of a firm which has been dissolved by the separate insolvency of the other partners, is not entitled as of right to administer the partnership assets and settle its affairs. Hubbard *v.* Guild, 1 Duer, 662.

A dissolution of partnership revokes the authority of one partner to bind the other in respect to any new contracts, and restricts it to the settlement of the partnership concerns. Bell *v.* Morrison, 1 Pet. 351; Neal *v.* Hassan, 3 McCord, 278; Chase *v.* Kendall, 6 Ind. 304; Palmer *v.* Dodge, 4 Ohio St. 21; Perrin *v.* Keene, 20 Me. 355; Ellicott *v.* Nichols, 7 Gill, 85; Hurst *v.* Hill, 8 Md. 399; Speake *v.* White, 14 Tex. 364; Bank of Port Gibson *v.* Baugh, 16 Miss. 290; Sutton *v.* Dillaye, 3 Barb. 529; Whitehead *v.* Bank of Pittsburg, 2 Watts & S. 172; Dunlap *v.* Limes, 49 Iowa, 177; see, also, Bennett *v.* Buchan, 61 N. Y. 222.

Where a plaintiff in a judgment given him by a firm composed of three members, for liabilities incurred upon notes discounted for their use, continues his liability as accommodation drawer or indorser of new notes given by the firm, after he knows that one member has retired, he cannot in a *sci. fa.* to revive his judgment, in which the two surviving members of the old firm and the administrator of the retiring partner, who died after suit brought, are defendants, recover for the new liabilities assumed after the dissolution, unless they are renewals of the notes of the old firm. Hartley *v.* Kirlin, 45 Pa. St. 49.

No liability can be created on the credit of a firm which has been dissolved, unless the firm name is used in making purchases. Kirby *v.* Hewitt, 26 Barb. 607.

After dissolution of a partnership one partner cannot be subjected to liability for use of the money of a third party by his partner, when he himself has derived no advantage from its use, nor ratified the act of the partner in using it. Dunlap *v.* Limes, 49 Iowa, 177

Doctrine not admitted at law.

Lyon v. Haynes.

Lyon v. Haynes (e) is a strong authority to show that when an unincorporated company is dissolved by a resolution of a meeting competent to dissolve it, the power of a majority of shareholders to bind the minority is at an

The remaining partners, after a dissolution, are entitled to the possession of the effects for the purpose of settling up the concern, and without interference, unless for good cause shown, on the part of strangers who may have purchased the shares of retiring partners. Reece v. Hoyt, 4 Ind. 169.

Though a partnership for a single transaction, as in a contract upon a canal, mutually terminates with the completion of the purposes for which it was formed, yet, as between the partners themselves and others, it continues for the purpose of winding up its affairs. Petriken v. Collier, 1 Pa. St. 247.

It is competent for partners after dissolution to carry out a contract previously made, and in part performed. Holmes v. Shands, 27 Miss. 40.

For the purpose of carrying out a contract, intended to be fulfilled after dissolution, the partnership continues after the dissolution. Western Stage Co. v. Walker, 2 Iowa, 504.

If a claim is placed in the hands of two attorneys, practicing in partnership, and, before any steps are taken in the collection of the claim, the firm dissolves, and one of the members takes charge of the claim, and renders all the services in its collection, and sues individually the owner of the claim for his fees in so doing, the jury will be justified in inferring that it was part of the contract of dissolution between the partners that the one who has rendered the services should attend to the claim and receive the compensation, and their verdict to that effect will be upheld. Anderson v. Tarpley, 12 Miss. 507.

After the dissolution of a partnership, and a sale by one partner of his interest to the other, who undertook to pay all the partnership debts: *Held*, that an account rendered by the acting partner, or his clerk, after the dissolution, showing a balance due from the partnership, was binding on the retired partner. Garland v. Agee, 7 Leigh, 362. See, however, Woodworth v. Downer, 13 Vt. 522; also Rootes v. Wellford, 4 Munf. 215, where it was held that one partner, after the dissolution of the partnership, cannot bind the rest without their consent, by settling accounts with, or allowing credits to, customers of the firm. In Vinal v. Burrill, 16 Pick. 401, it was held that in an action against partners upon an alleged partnership account, it is competent for the plaintiff to prove that one of the partners, after the dissolution of the co-partnership, acknowledged the account to be correct, and directed that a balance against a co-partner, on a separate account with the plaintiff, should be transferred to the debit of the partnership, stating that it was all one concern.

After the dissolution of a partnership, one partner, though he is authorized to settle the partnership concerns, has no right to receive goods consigned to the partnership for sale prior to the dissolution; and a purchase of the goods by a person having knowledge of the facts,

(e) 5 Man. & Gr. 504. The question in this case was whether an action would lie by a shareholder against directors for not applying the assets of the company as prescribed by a resolution made after the company had been dissolved. It was held that such action did not lie, although the directors had assumed to wind up the company under the authority of the resolution.

end; and that even as regards the mode of winding up the concerns of the defunct company, the majority of its shareholders cannot bind either a dissentient minority or absentees.

to pay a debt due him from the partnership, is void. Stiernermann *v.* Cowing, 7 Johns. Ch. 275.

After a dissolution, each partner need not be put separately in default on a contract made before. So any partner may accept delivery of goods sold to the firm; and the price may be demanded of any partner. White *v.* Kearney, 2 La. Ann. 639.

One who has power to wind up a partnership in which he was concerned, by selling the merchandise belonging to the firm, has also power to receive payment, unless restrained by some special turns of the agency. Lamb *v.* Salters, 3 Brev. 130.

The receipt of property is not in itself a payment of a debt, and can only become so by an agreement to receive such property as payment. Such an agreement is a new contract, and will not be binding on the firm, if made by a former partner after the dissolution, without the assent of his co-partner. Kirk *v.* Hiatt, 2 Ind. 322.

A partner who undertakes to collect the debts of the dissolved firm, is bound to the diligence of a collecting agent. He is responsible for all that it can be shown he collected, or might have collected with reasonable diligence. Phelan *v.* Hutchinson, Phill. Eq. 116; Pratt *v.* McHatton, 11 La. Ann. 260. See, also, Knox *v.* Spreecher, 68 Penn. St. 415.

Although one partner remains in possession of the books and papers of a firm after its dissolution, he is not thereby made responsible for debts which he neglects to collect. Wilder *v.* Morris, 7 Bush, 420.

The sale by one of two co-partners of all his interest in the firm assets to the other, and the assumption by the latter of its liabilities, confers upon the latter by implication all the usual powers of adjustment of claims, and among others, that of disposing of them by arbitration. Becker *v.* Boon, 61 N. Y. 317.

The plaintiffs, A and B, were partners. A suddenly disposed of all his property and sold his interest in the firm, except the accounts, to G, and absconded from the State, leaving the partnership book of accounts, embracing the account in suit, in the hands of G, with directions to collect them. B immediately notified the defendant to pay no one but himself, and demanded the company books of G, who refused to surrender them or give him a copy of the accounts. B then brought this suit, after which the defendant paid the debt to G, and took from him a release of it. G subsequently informed A of what he had done, and A approved it: *Held*, that G's discharge of the debt constitutes no defense to this suit. Ayer *v.* Ayer, 41 Vt. 346.

A surviving partner is not bound by an agreement of a deceased partner to apply the company effects in payment of his individual debt, but which was not carried out before his decease. Stearns *v.* Houghton, 38 Vt. 583.

In respect to their creditors, co-partners, after dissolution, are joint debtors and nothing more. What the joint makers of a promissory note may not do to enlarge, prolong, or continue existing liabilities, or to create a new one in regard to the debt, co-partners, after dissolution, may not do. Payne *v.* Slate, 39 Barb. 634.

A partner, after the dissolution of a co-partnership, although authorized to adjust the debts of the firm and to settle the partnership concerns, has no power to bind his co-partners by giving a

Other cases.

Other cases, which have been already referred to, (*f*) clearly show that after the dissolution of an ordinary partnership, no one aware of the dissolution is entitled on any ground of implied agency to hold the members of the late firm

promissory note; and this is so even though the note is given for a partnership debt. Lusk *v.* Smith, 8 Barb. 570; Lockwood *v.* Comstock, 4 McLean, 383; Van Valkenburg *v.* Bradley, 14 Iowa, 108; Long *v.* Story, 10 Mo. 636; Conklin *v.* Ogborn, 7 Ind. 553; Draper *v.* Bissell, 3 McLean, 275; Cunningham *v.* Bragg, 37 Ala. 436; Burr *v.* Williams, 20 Ark. 171; Chamberlain *v.* Bancroft, 24 Ga. 310; Richardson *v.* Moies, 31 Mo. 430; Lansing *v.* Gaine, 2 Johns. 300; Graves *v.* Merry, 6 Cow. 701; National Bank *v.* Norton, 1 Hill, 572; Galliott *v.* Planters', etc. Bank, 1 McMull, 209; Bank of South Carolina *v.* Humpheys, 1 McCord, 388; Loomis *v.* Pearson, 1 Harp. 470; Foltz *v.* Powrie, 2 Dessau. 40; Isler *v.* Baker, 6 Humph. 85; Lange *v.* Kennedy, 20 Wis. 279; Woodworth *v.* Downet, 13 Vt. 522; Morrison *v.* Perry, 18 N. Y. Supreme Ct. 33. See, however, Robinson *v.* Taylor, 4 Pa. St. 242; Petricksen *v.* Collier, 1 Pa. St. 247.

Although a partner cannot, after dissolution, bind his co-partner to the payment of a debt by note, yet he may give a note as evidence of indebtedness by previous account, as by so doing he does not create a debt. M'Pherson *v.* Rathbone, 11 Wend. 96; Ward *v.* Tyler, 52 Pa. St. 393.

A note made during partnership, but not delivered until after dissolution, does not bind the partners not delivering it. Woodford *v.* Dorwin, 3 Vt. 82; Scott *v.* Shipherd, Id. 108.

A bill drawn on a firm, but not accepted till after a dissolution of the partnership, publicly announced, binds only the partner who accepts. Tombeckbee Bank *v.* Dumell, 5 Mason, 56.

A partner authorized to settle the business of his firm after its dissolution, has no authority to accept, in the firm name, a draft drawn for money borrowed by him to pay the debts of the firm. Hamilton *v.* Seaman, 1 Ind. 185.

After dissolution, the partner who is authorized to settle up the business of the partnership, cannot renew a note in the partnership name, which was given before the dissolution, so as to bind the other partner. Parker *v.* Cousins, 2 Gratt. 372; Myatts *v.* Bell, 41 Ala. 222.

A surety on a note given by one of the partners after the dissolution of the co-partnership, duly notified, he being authorized to settle the affairs of the firm, to a creditor of the firm, in the partnership name, has no claim to indemnity from the other partner for any loss he may sustain. Palmer *v.* Dodge, 4 Ohio St. 21.

One partner may bind the others after dissolution, by a note, if he have express authority so to do, from the other partners standing by. Bower *v.* Douglass, 25 Ga. 714.

The defendant was a partner in several firms of merchants, which upon his withdrawal therefrom, were largely indebted to the plaintiff, for moneys borrowed for the use of the firms, of which defendant, as a partner, had received his proportionate benefit. Upon a dissolution of the old firms by the retirement of the defendant, the business was carried on by the other members of said firms, who had assumed the debts and notified the plaintiff thereof, as also

(*f*) *Ante*, p. 408, especially Kilgour *v.* Finlyson, 1 H. Blacks. 156, and Abel *v.* Sutton, 3 Esp. 108. See, too, Pinder *v.* Wilks, 5 Taunt. 611.

responsible for acts done by each other subsequently to the dissolution; and every one must feel the force of Lord Kenyon's observation in Abel *v.* Sutton, that if the contrary doctrine were to prevail, a man could never know when he was to be at peace and freed from all the concerns of the partnership.

Abel v. Sutton.

of the dissolution. They applied to the plaintiff for "renewals and extensions" of the debts, which the plaintiff agreed to grant upon condition that the liability of the defendant should be continued; the defendant thereupon executed and delivered to the plaintiff the following instrument: "The Bank of Mobile, (the plaintiff,) holds certain promissory notes of E. L. Andrews & Co., and Andrews & Brothers, of which firms I was a member until 30th September last. This is to witness, that E. L. Andrews and Z. Andrews, or either of them, is authorized to sign any notes with the name of the firm in liquidation, for the extension or renewal of said obligations, and I agree to continue my liability on such renewals or extensions, as if I yet continued a member of said firms:" *Held*, that this instrument is an unqualified personal power, given to either of the firms as *individuals* and not *as a firm*, which either could execute, and which could only expire by the extinguishment of the debts to which it relates, or notice to the bank that he would no longer be bound; and the taking into the firm of a new partner, after the execution of the power, in no respect affects the liability of the defendant. Bank of Mobile *v.* Andrews, 2 Sneed, 535.

If, after the dissolution of a co-partnership, one of the partners give a note in behalf of the former co-partnership, and the other partner pay a part of the note, such payment is *primâ facie* evidence of an existing partnership, or of an authority to give the note. Eaton *v.* Taylor, 10 Mass. 54.

The settling partner of a firm may give the note of the firm after its dissolution, to release their property from an attachment for a just debt, and a surety signing such a note, with notice, is responsible. Kemp *v.* Coffin, 3 Iowa, 190.

All the partners in a firm are bound by a note given by one of the partners after the dissolution of the partnership, for a debt contracted before the dissolution, if the giving of notes for debts of the firm was customary while the partnership continued, and the creditor had no notice of the dissolution. Pecker *v.* Hall, 14 Allen, 532.

After dissolution of a partnership, one partner cannot, without authority from the others, indorse a note belonging to the firm. Fellows *v.* Wyman, 33 N. H. 351; Sanford *v.* Mickles, 4 Johns. 224; Humphries *v.* Chastian, 5 Ga. 166; White *v.* Tudor, 24 Tex. 639; Bogerau v. Gueringer, 14 La. Ann. 478.

A valid title to a negotiable promissory note, payable to a co-partnership firm, may, however, be transferred by an indorsement made in the name of the firm, by one of the co-partners, though after the dissolution of the co-partnership, if such dissolution was unknown to the indorsee. Cony *v.* Wheelock, 33 Me. 366.

A firm dissolved in May, giving notice by publication and authorizing T., as the liquidating partner, to use the firm name for that purpose. In August, without the knowledge of his fellows, he drew notes payable to the firm, indorsed them with the firm name, and had them discounted by bankers with whom the firm had never had dealings. The proceeds

Extent of the doctrine.

The doctrine now in question cannot, it is submitted, be carried further than this, viz., that notwithstanding dissolution, a partner has implied authority to bind the firm so far as may be necessary to settle and liquidate existing demands, and

of the notes passed to the individual credit of J. There was evidence that the proceeds were applied to firm debts: *Held*, that if the notes were *bonâ fide* for liquidation, and the proceeds applied to payment of firm debts, the other partners would be liable. Lloyd *v.* Thomas, 79 Pa. St. 68.

One partner cannot bind his co-partners by indorsing, in the firm name, a note given after the dissolution of the partnership, to renew a note given before the dissolution. Lumberman's Bank *v.* Pratt, 51 Me. 563.

Where one of two partners, after dissolution of the partnership, being authorized to settle the affairs of the firm, indorses, "without recourse," in the partnership name, a promissory note payable to the firm, such indorsement conveys the legal title to the note. Waite *v.* Foster, 33 Me. 424.

If a note made payable to a firm is indorsed by one of the partners after dissolution, and without authority from the others, their subsequent ratification will supply the deficiency of authority. Leonard *v.* Wildes, 36 Me. 265.

One partner of a firm, even after dissolution, may indorse the note of the firm payable to himself, given before dissolution. Temple *v.* Seaver, 11 Cush. 314.

Under authority, though by parol only, given to one partner by the others after the dissolution of the partnership, to sell a negotiable note made to the firm before dissolution, he may indorse such note "without recourse," in the name of the firm. Yale *v.* Eames, 1 Metc. 486.

One of the members of a dissolved partnership may receive back a promissory note which they have wrongfully put into circulation while the partnership existed, and bind the other partners by such act. Torrey *v.* Baxter, 13 Vt. 452.

Where a note has been indorsed by a partner in the partnership name, one of the partners has authority to waive demand and notice after a dissolution and before the note becomes payable. Darling *v.* March, 23 Me. 184.

A promise made by a partner after the partnership has been dissolved, to pay a note on which the firm are indorsers, no notice of dishonor having been given, is not binding upon the other members of the firm. Schoneman *v.* Fegley, 7 Pa. St. 433.

Where a settling partner after dissolution of the firm, gives a draft in payment of a partnership debt, he cannot waive protest so as to bind his former co-partner, especially when the latter has been a dormant member. Mauney *v.* Coit, 80 N. C. 300.

The firm having indorsed a note, one of the partners may, after the dissolution of the firm, consent to the holder's compounding with and releasing the maker, and his consent will also bind the other partner, and make the firm liable for the balance due. Union Bank *v.* Hall, Harp. 245.

Generally each partner has the right to apply any of the partnership moneys in his hands to the satisfaction of the partnership debts. But the court may, in a proper case, direct a partner who has partnership moneys in his hands to pay the same into court to be applied to the payment of the debts, and in his relief or otherwise, as may be just. Carper *v.* Hawkins, 8 W. Va. 291.

After a dissolution and pending a liquidation, a partner can do no act.

to complete transactions begun, but unfinished, at the time of the dissolution. (*g*) Even Butchart *v.* Dresser, (*h*) which goes further than any other case, does not carry the doctrine beyond this. In that case two persons in partnership as share-

Butchart *v.* Dresser.

still less, use the partnership funds in a manner inconsistent with a just and proper settlement. Gridley *v.* Conner, 2 La. Ann. 87.

The dissolution of a partnership destroys the right of one partner to dispose of the partnership property absolutely, or otherwise, than according to the terms of the dissolution. Baldwin *v.* Johnson, 11 N. J. Eq. 441.

On January 1, 1875, a firm consisting of four members, two of the name of McPherson, and two of the name of Horton, was dissolved, and all the property divided, except certain accounts and an ice-house, which house it was agreed should be separated into two parts by a partition, and one-half be occupied by the McPhersons and the other by the Hortons, for the term of one year. The Hortons were to collect the outstanding credits, and apply them to the payment of the firm debts. On July 30, 1875, while the parties were in the occupation of the ice-house, under this agreement, one of the McPhersons, without the knowledge of the Hortons, and without special authority from either of the members of the firm, transferred the house to the plaintiff. In an action by the plaintiff against the defendants, the Hortons, to recover the house, with damages for its detention, *held*, that the authority of McPherson to transfer the firm property was not terminated by the dissolution of the firm, and that the plaintiff was entitled to recover. Van Doren *v.* Horton, 19 Hun, 7.

Where the articles of co-partnership provide that, on the dissolution of the co-partnership, its effects shall be divided among the partners, the partners become on such dissolution merely tenants in common, and no one of them can set off or sell the share of the other without his consent. Phillips *v.* Reeder, 18 N. J. Eq. 95. See, also, Hagendobler *v.* Lyon, 12 Kan. 276.

Ordinarily, during the existence of the partnership, one partner, acting within the scope of the partnership's business, may sell and dispose of the entire interest in the partnership's effects; but when the firm, though not formally dissolved, has closed its business, and reduced all its assets to the shape of two notes payable to the firm, if one partner fraudulently transfers these, the purchaser takes them subject to the other partner's equity. Halstead *v.* Shepard, 23 Ala. 558.

After the dissolution of a co-partnership, one of the partners cannot dispose of the partnership *choses in action* without the authority or assent of the other, so as to make him liable upon any covenants or obligations which he assumes on such transfer. Bennett *v.* Buchan, 53 Barb. 578.

After the dissolution of a co-partnership, one partner has not authority to make a general voluntary assignment of the effects of the partnership for the benefit of creditors, against the express dissent of his co-partners. Deckert *v.* Filbert, 3 Watts & S. 454.

After the dissolution of a partnership, one partner, without the consent of the other, cannot assign the partnership ef-

(*g*) See in Lyon *v.* Haynes, 5 Man. & Gr. 541, and in Smith *v.* Winter, 4 M. & W. 461, 462.

(*h*) 10 Ha. 463, and 4 DeG. M. & G. 542.

brokers contracted to buy shares. Before paying for them they dissolved partnership, and that fact was known to their bankers.

*413 *After the dissolution one of the partners pledged the shares to the bankers for money to pay for their purchase, and au-

fects for the benefit of preferred creditors. Egberts *v.* Wood, 3 Paige (N. Y.), 517. See *ante*, *Assignment*.

When goods are consigned to joint factors, and the partnership is dissolved, one retiring and the other remaining, and he who remains sells the goods and receives the avails, an action lies against both. Briggs *v.* Briggs, 20 Barb. 477.

During the existence of the partnership, either partner may make a valid assignment of the goods of the firm, to secure debts due therefrom; but if the partnership, by mutual consent, is dissolved, and the debts, accounts, and goods placed in the hands of a third person, to wind up and settle the firm business, neither partner can thereafter make a valid disposition of them. Mygatt *v.* McClure, 3 Head, 495.

After the dissolution of a partnership and an assignment by one partner to the other of all his interest in the book-debts and demands of the firm, with power to collect them for his own benefit, an attempt by the partner so assigning to to control one of those demands against himself, and to direct that it should not be allowed in set-off, can have no effect. Davis *v.* Briggs, 39 Me. 304.

A power of attorney, executed on the dissolution of a firm by two partners to a third, authorizing him to ask, demand, and receive the debts of the firm, and declaring the appointment irrevocable, does not operate as an assignment of such debts, and consequently does not render inoperative a release subsequently executed by one of the other members of the firm to one of its debtors. Napier *v.* M'Leod, 9 Wend. 120.

After the dissolution of a partnership, one of the partners, who has authority to collect the debts, may transfer to himself a debt due to the firm. Oxley *v.* Willis, 1 Cranch C. Ct. 436.

The implied power of a partner, after dissolution, to settle outstanding business of the firm, does not extend to authorize him to appear for his co-partner in a suit brought against the partners, though upon a firm indebtedness. Hall *v.* Lanning, 91 U. S. 160. See *post*.

But where one member of a partnership has, after dissolution thereof, defended and appealed from a judgment rendered in a suit against the firm, all the members are liable to a surety on the appeal bond, who is afterwards compelled to pay the judgment. Gard *v.* Clark, 29 Iowa, 189.

After dissolution one partner can compromise and settle a judgment valid against the late firm, and the others must contribute to the amount paid, though they did not assent to the compromise, and claim, but fail to show that they could have settled on better terms. Bass *v.* Taylor, 34 Miss. 342.

After dissolution of the partnership, one partner cannot discharge the debt of a third person to the firm, by a receipt given for the release of his individual indebtedness, to such person, particularly where the debtor had notice not to pay such partner. Sims *v.* Smith, 11 Rich. 565.

After the dissolution of a partnership by agreement, the partner, who is authorized to settle the estate, may borrow money on the credit of the firm, for the purpose of paying the debts of the firm; and if the credit is given in good faith, though with a knowledge of the dissolution, and the money is faithfully applied to the liquidation of the joint debts, the creditor has a claim against the firm, and is not to be considered as

thorized the bankers to sell the shares to indemnify themselves. The other partner contended that this was done without his authority, and that as the bankers knew of the dissolution, they could not retain the shares against him. The Vice-Chancellor, however, held that the partner who pledged the shares had authority, after the dissolution, to complete the contracts previously made by the firm; that he therefore necessarily had authority to raise the funds to pay for the shares in question, and that he had not gone beyond his au-

a creditor merely of the partner borrowing. Estate of Davis & Desauque, 5 Whart. 530; Prudhomme *v.* Henry, 5 La. Ann. 700.

The admissions of a partner, made after the dissolution of the partnership, are not admissible in evidence to bind the partnership. Bispham *v.* Patterson, 2 McLean, 87; Mercer *v.* Sayre, Anth. 119; Barringer *v.* Sneed, 3 Stew. 201; Lansing *v.* Gaine, 2 Johns. 300; Burns *v.* McKenzie, 23 Cal. 101; Daniel *v.* Nelson, 10 B. Mon. 316; Hamilton *v.* Summers, 12 Id. 11; Pope *v.* Risley, 23 Mo. 185; Bank of Vergennes *v.* Cameron 7 Barb. 143; Meggett *v.* Finney, 4 Strobh. 220; Berryhill *v.* McKee, 1 Humph. 31.

Thus, the admission of one partner, as to the existence of a debt against the firm, made subsequently to the dissolution of the partnership, is not binding on the other partners. Wilson *v.* Torbet, 3 Stew. 296; Chardon *v.* Oliphant, Treadw. Const. 635; Yandes *v.* Lefavour, 2 Blackf. 371; Brady *v.* Hill, 1 Mo. 315; Ward *v.* Howell, 5 Har. & J. 60; Shelton *v.* Cocke, 3 Munf. 191; White *v.* Union Ins. Co. 1 Nott & M. 556; Hackley *v.* Hastie, 3 Johns. 536; Gleason *v.* Clark, 9 Cow. 57; Brewster *v.* Hardeman, Dudley, 138; Conery *v.* Hayes, 19 La. Ann. 325; Chardon *v.* Oliphant, 3 Brev. 183. See, however, Simpson *v.* Geddes, 2 Bay, 533; Kendrick *v.* Campbell, 1 Bailey, 522.

The cases are not, however, entirely harmonious upon the subject of admissions. Thus, it has been held that the admissions of a partner, made after a dissolution of the partnership, are competent evidence against the firm, as to any contract made prior to such dissolution. Mann *v.* Locke, 11 N. H. 246. See, also, Taylor *v.* Hillyer, 3 Blackf. 433.

In Gay *v.* Bowen, 8 Metc. 100, it was *held*, that in an action to recover the amount of a draft drawn on the plaintiff by partners, and accepted by him, the admissions of one of the partners, made after the dissolution of the partnership, that the draft was accepted by the plaintiff for the accommodation of the firm, may be given in evidence to charge the other partner.

The admission, by one partner of the satisfaction of a debt due to the firm, has been held to bind the partnership, although made after dissolution, unless his want of authority be proved. Beckam *v.* Peay, 1 Bailey, 121.

So, in Cady *v.* Shepherd, 11 Pick. 400, it was held that the admissions of one partner, made after the dissolution of the partnership, in relation to a demand against the partnership not barred by the statute of limitations, are competent, though not conclusive, evidence against a co-partner, the joint contract being first proved *aliunde*.

Entries made after the dissolution of a partnership, in the partnership books, may be given in evidence against the party who made them. Simonton *v.* Boucher, 2 Wash. 473; Taunton Iron Co. *v.* Richmond, 8 Metc. 434.

thority in raising the money by pledging them with the bankers, as he had done. The Lords Justices took the same view. "The general law," it was said, "is clear that a partnership, though dissolved, continues for the purpose of winding up its affairs. Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership for partnership purposes as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution it would be necessary to apply to this Court for a receiver in every case, although the partners did not differ on any one item of the account."

Observations on this case.

It is to be observed that in Butchart *v.* Dresser, nothing was done except for the purpose of completing a transaction unfinished at the time of the dissolution. The case did not require the statement of so general a proposition as that until the affairs of a partnership are wound up; the agency of each partner continues to be as extensive as if no dissolution had taken place. At the utmost, the case under consideration decides, that in the event of a dissolution, it is competent for one partner to dispose of the partnership assets for partnership purposes. (*i*) But neither Butchart *v.* Dresser nor any other case shows that a person who knows that a partnership is dissolved, can hold *414 one partner liable for acts of his late *co-partners done subsequently to the dissolution, and without authority; and if in Butchart *v.* Dresser the money to pay for the shares had been raised by a bill, it could not, consistently with prior decisions, have been held that the dissolved firm was liable, either upon the bill itself, or for the money raised by its means.

Ault *v.* Goodrich.

Before leaving this subject it is necessary to notice Ault *v.* Goodrich (*k*), which is sometimes supposed to go much further than it really does. In that case, two persons, Wilcox the elder and Wilcox the younger, partners as timber merchants, entered into a joint speculation with the plaintiff and another in the purchase and sale of some trees. Wilcox the younger had the chief management of the affair, and before the ad-

(*i*) *Qu.* if Lewis *v.* Reilly, 1 Q. B. 349, and *ante*, p. 409, can be supported on this principle? Lord Denman's judgment seems to have proceeded on it. But see Smith *v.* Winter, 4 M. & W. 454.

(*k*) 4 Russ. 430.

venture was closed, the two Wilcoxes dissolved partnership. Wilcox the younger seems to have misapplied some of the moneys received by him on the joint account, and it was considered clear that Wilcox the elder was responsible for the dealings and transactions of Wilcox the younger during the continuance of their partnership. It was also considered that as there was no evidence of any new agreement between any of the parties upon the dissolution of partnership between the Wilcoxes, the other parties to the adventure were to be treated as having continued to rely on the joint responsibility of the two Wilcoxes, in respect of the dealings of Wilcox the younger. Wilcox the elder was accordingly declared to be responsible for the conduct of Wilcox the younger after the dissolution.

Observations on this case.

Upon this case it may be observed; first, that the facts are not satisfactorily stated; and secondly, that the judgment leads to the inference, that the responsibility of Wilcox the elder for the conduct of Wilcox the younger, did not turn upon the circumstance that they were partners, but upon the circumstance that they were jointly entrusted with the management of the tree speculation. In this view of the case it was obviously immaterial whether the Wilcoxes had dissolved partnership or not.

Notice in case of retirement of dormant partner.

What amounts to notice of dissolution.—It has been already seen that when a dormant partner retires, he need give no *notice of his retirement in order to free himself from liability in respect of acts done after his retirement. (*l*) The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or truly allege that, when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith. *415

Notice in case of retirement of ostensible partner.

But when an ostensible partner retires, or when a partnership between several known partners is dissolved, the case is very different; for then those who dealt with the firm before a change took place are entitled to assume that no change has occurred until they have notice to the contrary. And even those who never had dealings with the firm, and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no

(*l*) *Ante*, p. 405.

longer. (*m*) An old customer, however, is entitled to a more specific notice than a person who never dealt with the firm at all (*n*)[1]; and in considering whether notice of dis-

Old customers entitled to special notice.

(*m*) Parkin *v.* Carruthers, 3 Esp. 348.

(*n*) Graham *v.* Hope, Peake, 154.

[1] Where a change takes place in a firm, by some members retiring, and where the same firm name is still used, such retiring members can only relieve themselves from liability by giving actual notice of such fact to former creditors who continue to deal with the firm. As to them the partnership is presumed to continue the same as it was when they commenced to deal with it, until they in some way have actual notice a change has taken place. Holtgreve *v.* Wintker, 85 Ill. 470; Stall *v.* Cassady, 57 Ind. 284; Davis *v.* Willis, 47 Tex. 154; Dickinson *v.* Dickinson, 25 Gratt. 321; Kenney *v.* Atwater, 77 Penn. St. 34; Carmichael *v.* Greer, 55 Ga. 116; *Re* Krueger, 2 Lowell, 66; Holland *v.* Long, 57 Ga. 36; Stewart *v.* Sonneborn, 51 Ala. 126; Shamburg *v.* Ruggles, 83 Pa. St. 148; Austin *v.* Holland, 69 N. Y. 571; Bank of the Commonwealth *v.* Mudgett, 44 N. Y. 514; Polk *v.* Oliver, 56 Miss. 566; Denman *v.* Dosson, 19 La. Ann. 9; Pope *v.* Risley, 23 Mo. 185; Epps *v.* Dillaye, 6 Barb. 244; Johnson *v.* Totten, 3 Cal. 343; Page *v.* Brant, 18 Ill. 37; Williams *v.* Bowers, 15 Cal. 321; Ennis *v.* Williams, 30 Ga. 691; Lowe *v.* Penny, 7 La. Ann. 356; Skannel *v.* Taylor, 12 Id. 773; Reilly *v.* Smith, 16 Id. 31; Zallar *v.* Janvrin, 47 N. H. 324; Vernon *v.* Manhattan Co. 17 Wend. 524; Wardwell *v.* Haight, 2 Barb. 549; Como *v.* Port Henry Iron Co. 12 Id. 27; Felbretch *v.* Armstrong, 5 Robt. 339; Williams *v.* Birch, 6 Bosw. 299; Schieffelin *v.* Stevens, 1 Wins. (N. C.) L. 106; Little *v.* Clarke, 36 Pa. St. 114; White *v.* Murphy, 3 Rich. 369; Hutchins *v.* Hudson, 8 Humph. 426; Kirkman *v.* Snodgrass, 3 Head, 370; Tudor *v.* White, 27 Tex. 584; Prentiss *v.* Sinclair, 5 Vt. 149; Deering *v.* Flanders, 49 N. H. 225.

See, however, Vaccaro *v.* Toof, 9 Heisk. 194.

Where a firm had been dealers with a bank in their co-partnership business, and their character as partners was known to the bank, and it was in the bank-book of the firm that a note was entered as having been discounted on their behalf, the signature of the firm being indorsed thereon: *Held*, in a suit to charge the firm as indorsers of the note, that the relation of the firm to the bank was such as to require notice of dissolution to be given to the bank; and that an advertisement of dissolution in a newspaper was not sufficient to relieve one of the partners from his liability upon the note. Bank of the Commonwealth *v.* Mudgett, 45 Barb. 663.

A person in the employment of a firm at the time of dissolution, who continues to serve without having notice of the dissolution, can hold the retiring partner liable for his compensations. Austin *v.* Holland, 69 N. Y. 571.

The fact that sufficient time to give public notice had not elapsed between the dissolution of a firm and the subsequent making of a note by one of the late partners, will not excuse the partners from their liability to pay such note, in the hands of a *bona fide* holder. Bristol *v.* Sprague, 8 Wend. 423.

Want of notice of a dissolution of partnership will charge the firm on a subsequent accommodation indorsement, the holder having had previous dealings with the firm, in the same manner as if the firm continued to exist. Dundass *v.* Gallagher, 4 Pa. St. 205.

That a bank has discounted notes bearing the names of a partnership, does not constitute them dealers, so as to re-

solution or retirement is or is not sufficient, a distinction must be made according as the person sought to be affected by notice was or was not a customer of the old firm.

When a known partner retires, or a partnership is dissolved, notice of the fact is usually given to the world at large by advertisement, and to old customers by some special communication.

quire actual notice of dissolution to exonerate a retiring partner. City Bank of Brooklyn *v.* McChesney, 20 N. Y. 240; Same *v.* Dearborn, Id. 244. See, however, Mechanic's Bank *v.* Livingston, 33 Barb. 458.

Where a small amount of goods has been sold to a partnership without any fixed period of credit, but not paid for till some months after the sale, the vendors of the goods are properly dealers with the partnership, and must receive actual notice of the retirement of a member, to release him from his liability to them as a partner, upon sales to the partnership subsequent to his retirement. Clapp *v.* Rogers, 12 N. Y. 283. See, also, Clapp *v.* Rogers, 1 E. D. Smith, 549.

A single cash sale of cattle to a partnership firm dealing in cattle, does not make the seller such a dealer as entitles him to actual notice of the dissolution of the partnership, or, through lack of such notice, to hold both partners on a sale made two years thereafter, and eighteen months after the dissolution of the firm, where the actual dealings are had with only one of the former partners. Merritt *v.* Williams, 17 Kan. 287.

The defendants had been partners previous to March, 1857, at which time they dissolved partnership and advertised the dissolution in a newspaper published in the town where they had done business. The business was continued by one of the partners, who, in the fall of 1857, bought coal of the plaintiffs, which the latter sold with no knowledge of the dissolution, and on the credit of the partnership. The plaintiffs had sold coal in one instance to the defendants before the dissolution, which was the only dealing they had had with them, but the defendants had been regular customers of a firm which sold coal at the same place, and to which the plaintiffs had succeeded, the former firm having consisted of one of the plaintiffs and one A, and the present firm of the same plaintiff and one B, who had for some years been a clerk of the former firm: *Held*, that the plaintiffs were to be regarded as having had "former dealings" with the defendants, and that they could be affected only by actual notice of the dissolution. *Held*, also, that the lapse of time between the dissolution and the purchase of the coal, the fact that the plaintiffs were doing business in the same town with the defendants, and the fact that an advertisement of the plaintiffs stood next to the advertisement of the dissolution in the newspaper; although, to be considered in determining whether the plaintiffs had actual notice, were of no avail in law against the fact that they had no actual knowledge of the dissolution. Lyon *v.* Johnson, 28 Conn. 1.

It makes no difference how notice is given of a change in the firm, whether by the retiring members or by any other means, so that actual notice of the fact is brought home to the former correspondents. Holtgreve *v.* Wintker, 85 Ill. 471.

No formal or precise announcement of the dissolution of a partnership, either by publication or otherwise, is necessary

Public notice given by advertisement in the "Gazette" is sufficient not only against all who can be shown to have seen it, but also as against all who had no dealings with the old firm, whether they saw it or not. (*o*)[2] But an advertise-

Public notices by advertisement.

to bind a dealer with the firm, but knowledge of any fact, however acquired, sufficient to put an ordinarily prudent man upon inquiry, will charge them with notice of whatever other facts a reasonable investigation would have disclosed. Persons who have dealt with a partnership are effected with notice of its dissolution, if a statement of the fact that they have dissolved (though informal, and not signed by any member of the firm,) has reached them in any way which advised them of the fact, and was sufficient to put them on inquiry. Young *v.* Tibbitts, 32 Wis. 79. See, also, Ransom *v.* Loyless, 49 Ga. 471.

In an action on a note signed by a firm, evidence that one partner told several persons, prior to the execution of the note, that the firm was dissolved, is inadmissible to prove a dissolution when no notice is shown to the plaintiff, the payee. Pursley *v.* Ramsey, 31 Ga. 403.

To charge a principal with notice of the dissolution of a mercantile partnership, on the ground that notice was given to his agent, it must be shown that the agent was authorized to represent his principal in that particular. Stewart *v.* Sonneborn, 49 Ala, 178.

Notice of dissolution, published in a newspaper and accidentally reaching a bank director, will not affect the bank. National Bank *v.* Norton, 1 Hill (N. Y.) 572.

(*o*) Godfrey *v.* Turnbull, 1 Esp. 371; Wrightson *v.* Pullan, 1 Stark. 375; Godfrey *v.* Macauley, 1 Peake, N. P. 209; Newsome *v.* Coles, 2 Camp. 617.

[2] Notice of the dissolution of a partnership by publication in some newspaper of general circulation, is sufficient notice to all persons who have not had dealings with the firm. Shurlds *v.* Tilson, 2 McLean, 458; Watkinson *v.* Bank of Pennsylvania, 4 Whart. 482; Gallicott *v.* Planters' & Mechanics' Bank, 1 McMull. 209; Mauldin *v.* Branch Bank, 2 Ala. 502; Lucas *v.* Bank of Darien, 2 Stew. 280; Lansing *v.* Gaine, 2 Johns. 300; Prentiss *v.* Sinclair, 5 Vt. 149; Graves *v.* Merry, 6 Cow. 701; Polk *v.* Oliver, 56 Miss. 566; Simonds *v.* Strong, 24 Vt. 642; Martin *v.* Searles, 28 Conn. 43; Martin *v.* Walton, 1 McCord, 16. See, also, Grinman *v.* Baton Rouge Co. 7 La. Ann. 638; but as to those who have had dealings, it shall not be so considered, unless under circumstances it appears satisfactory to the jury that it operated as a notice. Martin *v.* Walton, 1 McCord, *supra*. See next note, *supra*.

A retiring partner is not required to give notice, so as to relieve himself from liability to those who for the first time deal with the firm after the dissolution takes place, unless he permits his name to be used in the transaction of the business, or so conducts himself with reference to the firm transactions, as to induce the belief in those dealing with the firm that he is still a member. Gaar *v.* Huggins, 12 Bush, 259.

Two partners of a firm resided in New York, and the third resided in Norwich, in Connecticut, their usual place of doing business. Upon dissolution, notice was given for several weeks successively in two newspapers, one printed at Norwich, and the other at New London, in the vicinity of Norwich. One of the New York partners afterwards indorsed a bill of exchange in New York with the company name, but whether the indorsee had or had not actual notice of the dissolution, or whether he had

ment in any other paper is no evidence against anyone who cannot be shown to have seen it. (*p*) If, however, it can be shown that he was in the habit of taking the paper (*q*), that is evidence to go to the jury of his having seen not only the particular *paper *416 containing the advertisement, but also the advertisement itself (*r*)[1]; and if the jury are satisfied that he saw the advertisement,

ever been a correspondent of the company, did not appear: *Held*, that these facts constituted reasonable notice to him, and to every person not a correspondent of the company. Mowatt *v.* Howland, 3 Day, 353.

The character of the notice to affect subsequent dealers must be such as to advise the public as to the dissolution of the firm—as by changing the firm name on the sign and in business transactions, publication in a newspaper or otherwise—and a private notice to the former dealers is not alone sufficient to affect subsequent ones; and generally whether the proper notice has been given, is a question of fact for the jury. Polk *v.* Oliver, 56 Miss. 566.

A, having had no previous dealings with a firm, but having heard of its existence, and who composed it, sold goods to one of the partners, and received in payment therefor a draft by him drawn upon the firm, and accepted in his name. At the time of the transaction the firm was in fact dissolved; but A had no notice thereof: *Held*, that, in order to protect a retired partner against such acceptance of the draft at the suit of A, evidence tending to show a public and notorious disavowal of the continuance of the partnership is admissible. Lovejoy *v.* Spafford, 93 U. S. 430.

A commercial partnership was dissolved in New Orleans without notice, and the partners under the same name established a planting partnership in a country parish, where they resided. They withdrew wholly from mercantile business, and nothing showed that the old mercantile name, as such, was afterwards used, or that plaintiff who resided near them, ever dealt with the New Orleans firm, or looked to it for his indemnity as surety for the partners: *Held*, that he could not hold them liable as commercial partners. Stewart *v.* Caldwell, 9 La. Ann. 419.

An act of Canada in relation to the registration of notice of dissolution of a firm, does not affect the rights of the Vermont plaintiffs in a suit brought in that state against members of a Canada firm on a note payable in Montreal. Wait *v.* Brewster, 31 Vt. 516.

(*p*) Lesson *v.* Holt, 1 Stark. 186; Boydell *v.* Drummond, 11 East, 144 *n.*

(*q*) Showing that the paper circulated in his neighborhood goes for nothing alone. Norwich and Lowestoft Co. *v.* Theobald, M. & M. 153.

(*r*) See Jenkins *v.* Blizard, 1 Stark. 418, where, however, the plaintiff had a verdict; Rowley *v.* Horne, 3 Bing. 2.

[1] The publication of the notice of dissolution of a partnership in a newspaper taken by the plaintiffs, is a fact from which the jury may infer actual notice. Treadwell *v.* Wells, 4 Cal. 260; Page *v.* Brant, 18 Ill. 37. See, also, Hutchins *v.* Bank of Tennessee, 8 Humph. 418.

A party will not be affected by notice of the dissolution of a partnership by the certificate merely of the editors of a newspaper that a notice of the dissolution was published in it, without proof that the party sought to be affected took or read the paper. Boyd *v.* McCann, 10 Md. 118.

that will be sufficient, although no advertisement was inserted in the "Gazette." (*s*) An advertisement, moreover, is not indispensable; its place may be supplied by something else. Thus a change in the name of a firm[1] painted on its counting-house, accompanied by a removal of the business of the old firm (for the purpose of winding up), and coupled with announcements of the change by circulars sent to the old customers, was held to be sufficient without any advertisement as against a person who had not been an old customer, and who was not proved to have had any distinct notice. (*t*)

Such notice not indispensable.

As against persons who dealt with the firm before any change in it took place, an advertisement without more is of little or no value, whether it be in the "Gazette" or elsewhere. (*u*) But if notice in point of fact can be established, it matters not by what means;[2] for it has never been held that any particular formality must be observed. If an old customer can be shown to have seen the advertisement, that will be sufficient; and evidence that he took in a certain paper is some evidence that he knew of a dissolution advertised therein. (*x*) Again, general notoriety, a change in the name of the firm, and advertisements, coupled with the execution of powers of attorney to the new firm,

Special notices.

Where, in an action on a book account against two co-partners, one defended on the ground of a dissolution of the partnership and notice to plaintiff before goods bought, proof of advertisement of dissolution in a paper which plaintiff did not take, or of defendant's declarations to plaintiff that he was going out of the firm, but that his money would remain in it, will not amount to notice. Williamson *v.* Fox, 38 Pa. St. 214.

Proof that at the time of one's withdrawal from a firm at P, notice thereof was published in a P newspaper, which was sent to a customer in another city, with a red line drawn around the notice to call attention thereto: *Held*, to be insufficient to establish actual notice. Haynes *v.* Carter, 12 Heisk. 7.

Where the facts are ascertained, it is a question of law whether notice of dissolution is reasonable or not. Mowatt *v.* Howland, 3 Day, 353.

(*s*) Rooth *v.* Quin, 7 Price, 193.

[1] Where a notice of a change of firm name is relied on to exonerate one who has been a partner, such change must indicate that he has withdrawn from the business, so as to put dealers with the concern upon inquiry. American, etc. Co. *v.* Wortendyke, 24 N. Y. 550.

(*t*) M'Iver *v.* Humble, 16 East, 169; but see Gorham *v.* Thompson, 1 Peake, N. P. 60.

(*u*) Graham *v.* Hope, Peake, 154.

[2] It matters not how the creditor learns of the dissolution of the partnership; and it is error for a judge to charge in such a way as to lead the jury to think a particular kind of notice necessary. Davis *v.* Keyes, 38 N. Y. 94.

(*x*) *Ante*, note (*r*).

were held (Bolland, B. *dissentiente*) to warrant the jury in finding knowledge by an old customer of a change in the old firm. (*y*) So, in the case of bankers, a change in the name of the firm appearing on the face of the cheques used by their customers, has been held sufficient notice to an old customer who had drawn cheques in the new form. (*z*)

With respect to advertisements, it may be here remarked, that an advertisement of an agreement to dissolve is not *admissible in evidence unless stamped; but that an advertisement of an actual dissolution is admissible without a stamp. (*a*)

*417 Stamp on advertisements.

(*b.*) *Termination of liability as to past acts.*

When once it can be shown that liability has attached to any partner, the *onus* of proving that such liability has ceased is upon that partner, or those representing him. (*b*)[1] The events which have to be considered with reference to this subject may be reduced to four classes, viz.—

Termination of partner's liability in respect of past transactions.

(*y*) Hart *v.* Alexander, 2 M. & W. 484; 7 C. & P. 746.

(*z*) Barfoot *v.* Goodall, 3 Camp. 147.

(*a*) May *v.* Smith, 1 Esp. 283; Jenkins *v.* Blizard, 1 Stark. 418.

(*b*) See 3 Mer. 619.

[1] If one partner withdraws from the co-partnership, thereby causing its dissolution, he continues liable for the non-performance of an executory contract previously entered into by the co-partnership, in the same manner as if no dissolution had taken place. Whiting *v.* Furranet, 1 Conn. 60. See, also, Mudge *v.* Treat, 57 Ala. 1; Dickson *v.* Ind. C. M. Co. 63 Ind. 9.

The dissolution of a law partnership does not dissolve the relation to the client, and the client may look to both partners for the performance of a duty confided to the firm. McCoon *v.* Galbraith, 29 Pa. St. 293; Smyth *v.* Harvie, 31 Ill. 62.

If attorneys who are co-partners accept a retainer, it is a joint contract, continuing to the termination of the suit, and neither can be released from the obligations they have assumed, so far as their clients are concerned, by a dissolution of their firm, or any other act or agreement between themselves. Walker *v.* Goodrich, 16 Ill. 341; Smyth *v.* Harvie, *supra;* Morgan *v.* Roberts, 38 Ill. 65.

The members of a law firm are liable, jointly and severally, to their client for money collected for him. And when such moneys are collected after the dissolution of the firm by a retiring partner, who has no authority to make such collection, the other partners continue liable therefor. Bryant *v.* Hawkins, 47 Mo. 410; Smyth *v.* Harvie, *supra.*

A, an attorney associated with B, received from C a demand for collection. A retired from practice and left the claim with B, who became a co-partner with D, B and D brought suit and recovered judgment on the demand, and the sheriff collected the money on exe-

1. Events over which his creditor has no control, *e.g.*, the death or bankruptcy of the partner.

2. Dealings and transactions between the creditor and the partner whose liability is in question.

cution and paid it over to D: *Held*, in an action by C against A to recover the money collected on execution, that the sheriff was justified in paying the money to D, and that A was liable therefor: Wilkinson *v.* Griswold, 20 Miss. 669.

A contract with a law firm for the services of a particular partner, at a stipulated fee, cannot be broken by the client on the death of such partner, without tendering to the survivor a fair compensation for services already performed; and if the surviving partner shall render the services with due professional skill and diligence, he is entitled to the entire fee. Smith *v.* Hill, 13 Ark. 173.

If merchandise be consigned to and and received by a firm to sell on commission, a partner afterwards retiring cannot, by notice of that fact to the consignor, avoid the liability which attached to him as a partner on receiving the goods; and refusing to admit evidence of such notice, is not error in the court trying an action founded on such liability. Dean *v.* McFaul, 23 Mo. 76; Holden *v.* McFaul, 21 Mo. 215. See, also, Briggs *v.* Briggs, 15 N. Y. 471.

The appointment of a receiver of a co-partnership, and the transfer of all its effects to him, does not operate as a rescission on the part of the co-partnership of a contract between the latter and an employe. Bird *v.* Austin, 40 N. Y. Superior Ct. 109.

Where partners in trade take a lease of a store, and afterwards dissolve the partnership, the lease or the stock in trade does not cease to be partnership property as against the rent notes. Boone *v.* Sirrine, 38 Ga. 121.

The defendants, who were co-partners, doing business as factors in Charleston, employed the plaintiff, and contracted to give him all their draying; they afterwards dissolved their partnership, and the new firm did not employ him: *Held*, that the contract terminated with the partnership. Holmes *v.* Caldwell, 8 Rich. 247.

A creditor entered into an agreement with a firm in respect to the management of the partnership property, upon which he had a lien for an indebtedness to him, and upon which indebtedness, in consideration of the agreement, he was to extend time of payment: *Held*, that a dissolution of the partnership by a withdrawal of one of the members, and the transfer of his interest to the remaining one, worked such an abandonment of the contract on the part of the partnership as absolved the creditor from further observance of it on his part. Turk *v.* Nicholson, 30 Iowa, 407. See, however, Dickson *v.* Ind. C. M. Co. 63 Ind. 9.

Where two persons form a partnership for a single venture, misappropriation of the funds by the partner borrowing money on the credit of the firm, does not relieve the firm from liability. Howe *v.* Patterson, 53 Ala. 205.

Three persons being sued as partners, proof that after part of the account sued upon was created, and the partnership dissolved, the retiring partner paid the others a sum of money to cover his responsibility for the firm debts, is irrelevant and inadmissible. Gooden *v.* Morrow, 8 Ala. 486.

3. Dealings and transactions between the creditor and the other members of the firm; and,

4. Lapse of time.

The second of these classes of events does not require special notice. The effect of bankruptcy and death will be examined in a subsequent part of this work. There only remain, therefore, to be considered here the third and fourth classes of events alluded to.

Termination of joint obligations.

The nature of an obligation which is joint, or joint and several, is such that although each person subject to the obligation is responsible for its performance, yet each is not bound to perform it without reference to the question whether it has already been performed by the others; for whether the obligation be joint, or joint and several, it has only to be performed once; and performance by any one of the persons obliged is available as a defense to a second demand made against the others. (*c*) And not only is a joint, or joint and several, obligation at an end when performed by one of the persons in whom it resides, but whatever extinguishes the right to demand performance of that obligation extinguishes the obligation itself, and discharges all the persons in whom it *resided. (*d*) But an event which merely *418 disables a creditor from suing one of several persons jointly, or jointly and severally, indebted to him, does not necessarily extinguish the debt. For example, if one of the persons indebted becomes bankrupt and obtains his discharge, although *his* liability is thereby at an end, yet the other persons indebted are not discharged from their obligation to pay. (*e*) So a covenant by the creditor not to sue one of several persons liable jointly, or jointly and severally, does not extinguish the creditor's right to obtain payment; its effect only being to give the covenantee a right to be indemnified by the creditor against the consequences of an exercise of his right. (*f*) So, if the creditor receives from one of several

(*c*) See, as to payment by one, Walters *v.* Smith, 2 B. & Ad. 889; Thorne *v.* Smith, 10 C. B. 659; Beaumont *v.* Greathead, 2 ib. 494.

(*d*) See Cheetham *v.* Ward, 2 Bos. & P. 630; *Ex parte* Slater, 6 Ves. 146; Ballam *v.* Price, 2 Moo. 235; Cocks *v.* Nash, 9 Bing. 341; Wallace *v.* Kelsall, 7 M. & W. 264; Nicholson *v.* Revill, 4 A. & E. 675.

(*e*) 32 & 33 Vict. c. 71, § 50; Crosse *v.* Smith, 7 East, 256; Noke *v.* Ingham, 1 Wils. 89; 1 Wms. Saund. 207, *a*.

(*f*) See Lacy *v.* Kinaston, 1 Ld. Raym. 688; Dean *v.* Newhall, 8 T. R. 168; Walmesley *v.* Cooper, 11 A. & E. 216.

debtors part of the debt, this does not discharge the others from their liability to pay the residue. (*g*)

In order to show the application of these principles to the discharge of a partner from a liability already incurred by him, it will be convenient to consider the effect of

1. Payment.
2. Release.
3. Substitution of debtors and securities.
4. Lapse of time.

An examination of these subjects will involve an inquiry into the mode in which retired partners and the estates of deceased partners cease to be liable to creditors of the firm to which they belonged.

1. *Payment.*

Payment by one partner of partnership debts.

Payment of a partnership debt by any one partner discharges all the others, if the object of the partner paying *419 was *to extinguish the whole debt, or if he made the payment out of the partnership funds. (*h*)[1] But if a firm is unable to pay a debt, and one partner

(*g*) See Walters *v.* Smith, 2 B. & Ad. 889.

(*h*) See the cases cited, *ante*, p. 417, note (*c*).

[1] See *ante*, 275, note.

Where two co-partners had dissolved partnership, one of them carrying on the business and liquidating the debts of the old firm, a receipt given by him to a firm creditor on a note, acknowledging the receipt of stocks sufficient to pay the note, and promising to deliver them on surrender of the receipt, was *held* to be such a payment of the note as to discharge the retiring partner from his liability as surety. Colgrove *v.* Tallman, 2 Lans. 97.

M., R. and G., who were co-partners, made their firm note on demand and transferred it for value. Afterwards G. retired from the firm, and with the consent of M. and R., B. was substituted as partner in his place and assumed all his debts and liabilities, and the note was entered on the books of the new firm as an indebtedness. After this, as payment of the purchase price of property sold by M. to R., M. received the note from R. M. afterwards transferred the note to his son, who brought action thereupon: *Held*, that as between M. R. and G., G. was, after the substitution of B. as partner, liable upon the note only as surety; that the receipt of the note for value by M. operated as a payment of the same, and the liability of the surety ceased, and that the subsequent transfer to M.'s son did not revive the note as against the firm or R. Morss *v.* Gleason, 4 Thomp. & C. 274.

A creditor of a firm, receiving from one of the partners, after the firm is dissolved, the paper of third persons in payment of his partnership demand, and in

out of his monies pays it, but in such a way as to show an intention to keep the debt alive against the firm for his own benefit, this payment by him will be no answer to an action brought against the firm by the creditor suing on behalf of the partner who made the payment. (*i*)

Imputation of payment made by one partner with money of firm.

If a partner is indebted on his own account to a person to whom the firm is also indebted, and that partner, with the monies of the firm, makes a payment to the creditor without specifying the account on which it is paid, the payment must be taken to have been made on the partnership account, and must be applied accordingly. (*k*)

Payment by new firm discharges old firm.

Inasmuch as a payment by A. of B.'s debt, on behalf of B., enures to the benefit of B. if the creditor accepts the money and B. does not repudiate the payment (*l*), it follows that if a firm is indebted, and, by the retirement of the original partners and the introduction of other partners, a wholly new firm is called into existence, a payment by the new firm expressly or impliedly on behalf of the old firm, of the debts contracted by the old firm, will extinguish its debt as between that firm and its creditor. But if there are circumstances showing that the money was paid, not on behalf of the old firm and in discharge of its liability, but as the consideration for a transfer to the new firm of the creditor's right against the old firm, the right of the creditor to sue the old firm will not be extinguished, but can still be exercised for the benefit of the new firm. (*m*)

As regards discharge by payment, it is important to bear in mind the general rules relating to the appropriation of *payments, and especially the rule in Clayton's case. The *420 general rules upon this subject are as follows:—(*n*)

exchange for the paper of the firm, thereby releases the other partners. But if the paper received in exchange be forged, then the transaction is void, and the original liability of all the partners revives. Pope *v.* Nance, 1 Stew. 354.

(*i*) McIntyre *v.* Miller, 13 M. & W. 725; *infra*, note (*m*).

(*k*) Thompson *v.* Brown, Moo. & M. 40. See, also, Nottidge *v.* Prichard, 2 Cl. & Fin. 379, affirming Prichard *v.* Draper, 1 R. & M. 191.

(*l*) Co. Litt. 207, *a*. See Belshaw *v.* Bush, 11 C. B. 191; Jones *v.* Broadhurst, 9 C. B. 193, &c.; Kemp *v.* Balls, 10 Ex. 607; Lucas *v.* Wilkinson, 1 H. & N. 420.

(*m*) See Lucas *v.* Wilkinson, 1 H. & N. 420; McIntyre *v.* Miller, 13 M. & W. 725, where one partner paid a debt due from the firm, but had the debt transferred to a trustee for himself.

(*n*) For more detailed information the reader is referred to an article by the

General rules as to appropriation of payments.

1. Where one person is indebted to another on various accounts, the debtor is at liberty to pay in full whichever debt he likes first. (*o*)

2. But a debtor has no right to insist on paying a debt partly at one time and partly at another (*p*); although if he does pay a debt in part and the creditor accepts the payment, the debt is extinguished to the extent of the payment thus made and accepted. (*q*)

3. The right of a debtor to appropriate a payment to whichever of several debts he prefers, can only be exercised at the time of payment, not afterwards. (*r*)

4. An appropriation by a debtor at the time of payment need not be express, but may be inferred from the nature of the debt and from the mode and circumstances of payment. (*s*)

5. Where the debtor, having the opportunity so to do, (*t*) makes no appropriation, express or tacit, at the time of payment, the creditor is entitled to appropriate the payment to whichever debt he pleases. (*u*)

6. And the creditor may exercise this right at any time he likes (*x*); but when he has once exercised it and given notice of such exercise to the debtor, no different appropriation can be made. (*y*)

7. The creditor may exercise his right in appropriating a payment, to a debt barred by the Statute of Limitations rather than to one that is not so barred (*z*); to a simple contract debt *421 *rather than to a specialty debt (*a*); to a new rather than to an old debt (*b*); to a debt not guaranteed rather than to one

author in the Law Magazine for August, 1855 (vol. 54, p. 21).

(*o*) Peters *v.* Anderson, 5 Taunt. 596; Mitchell *v.* Cullen, 1 McQu. 190.

(*p*) Dixon *v.* Clark, 5 C. B. 365.

(*q*) As to payments of so much in the pound, see *infra*.

(*r*) Peters *v.* Anderson, 5 Taunt. 596.

(*s*) Ib., and see *infra*, rule 8.

(*t*) This is essential. See Waller *v.* Lacy, 2 Man. & Gr. 54; Young *v.* English, 7 Beav. 10.

(*u*) See Simpson *v.* Ingham, 2 B. & C. 65. and the other cases cited in the next few notes.

(*x*) Phillpotts *v.* Jones, 2 A. & E. 41; Mills *v.* Fowkes, 5 Bing. N. C. 455.

(*y*) Simson *v.* Ingham, 2 B. & C. 65. See, as to representations made by the creditor, Wickham *v.* Wickham, 2 K. & J. 748.

(*z*) Mills *v.* Fowkes, 5 Bing. N. C. 455; Williams *v.* Griffiths, 5 M. & W. 300; Nash *v.* Hodgson, Kay, 650. Such an appropriation, however, does not amount to an admission by the debtor that the barred debt is due, and consequently does not take that debt out of the statute; see the last three cases.

(*a*) Peters *v.* Anderson, 5 Taunt. 596.

(*b*) Ib.

that is (*c*); and to a debt not bearing interest rather than to one which does. (*d*) But the debt must be one which is, or if not barred by time would be, enforceable by legal proceedings (*e*); and one which exists at the time the payment was made (*f*); and one which is then ascertained in amount (*g*); and one which is owing by the debtor and not by other persons. (*h*)

General rules as to appropriation of payments.

8. In the absence of evidence to the contrary, an appropriation by the debtor is inferred, and the right of the creditor to appropriate differently is excluded in the following amongst other cases:—

(*a*) Interest is presumed to be paid before principal. (*i*)

(*b*) The earlier items of one entire account are presumed to be paid before the later items of the same account. (*k*)

(*c*) Money coming to the hands of a creditor by the realization of a particular security is presumed to be appropriated to the debt thereby secured. (*l*)

(*d*) Money belonging to one person is presumed to have been paid in discharging his own and not another person's debt; and where a person fills several characters, the character in which he held the money which he paid, *primâ facie* determines the debt to which the payment must be appropriated. (*m*)[1]

(*c*) Kirby *v.* Duke of Marlboro', 2 M. & S. 18; Williams *v.* Rawlinson, 3 Bing. 71; Pease *v.* Hirst, 10 B. & C. 122. See, further, as to sureties, *infra;* Pearl *v.* Deacon, 24 Beav. 189, and 1 DeG. & J. 461; Thornton McKewan, 1 Hem. & M. 525.

(*d*) Chase *v.* Cox, Freem. 261; Manning *v.* Westerne, 2 Vern. 606.

(*e*) Wright *v.* Laing, 3 B. & C. 165.

(*f*) Hammersley *v.* Knowlys, 2 Esp. 666.

(*g*) Goddart *v.* Hodges, 1 Cr. & M. 33.

(*h*) See *infra*, rule 8. (*d*)

(*i*) Bower *v.* Morris, Cr. & Ph. 351; Thompson *v.* Hudson, 10 Eq. 497; Warrant Finance Co.'s case, 4 Ch. 643.

(*k*) Clayton's case, 1 Mer. 585, noticed *infra.*

(*l*) Brett *v.* Marsh, 1 Vern. 468; Young *v.* English, 7 Beav. 10; Pearl *v.* Deacon, 24 Beav. 186, and 1 DeG. & J. 461.

(*m*) Burland *v.* Nash, 2 Fos. & Fin. 687; Nottidge *v.* Prichard, 2 Cl. & Fin. 379; Goddart *v.* Cox, 2 Str. 1194; Thompson *v.* Brown, Moo. & M. 40; Bowes *v.* Lucas, Andr. 55. Compare Sterndale *v.* Hankinson, 1 Sim. 393, and Beale *v.* Caddick, 2 H. & N. 326, noticed *infra*, where the rule in Clayton's case also applied.

[1] Where the partnership funds of a firm have been misapplied by a member of the firm, towards the payment of a judgment holden by the creditor of the firm against him for his individual debt, such creditor may, on the application of the other member of the firm, apply the payment to his demand against the firm, and enforce his judgment, notwithstanding a receipt given, applying the payment on account of the judgment. Campbell *v.* Matheus, 6 Wend. 551.

*422 *(*e*) A dividend of so much in the pound on several debts is presumed to be paid in respect of them all, and must be applied accordingly. (*n*)

Rule in Clayton's case.

Of these rules the most important with reference to the subject-matter of the present treatise is that which is known as the rule in Clayton's case (*o*), that where there is one single open current account between two parties, every payment which cannot be shown to have been made in discharge of some particular item, is imputed to the earliest item standing to the debit of the payer at the time of payment.[1] If, therefore, a cus-

(*n*) Thompson *v.* Hudson, 6 Ch. 320; Hobson *v.* Bass, ib. 792; Raikes *v.* Todd, 8 A. & E. 846; Thornton *v.* McKewan, 1 Hem. & M. 525; Paley *v.* Field, 12 Ves. 435.

(*o*) 1 Mer. 572. See, in addition to the cases cited in the text as illustrating the rule in question, *Ex parte* Randleson, 2 D. & Ch. 534; Pennell *v.* Deffell, 5 DeG. M. & G. 372; Copland *v.* Toulmin, 7 Cl. & Fin. 349; Brown *v.* Adams, 4 Ch. 764; Laing *v.* Campbell, 36 Beav. 3.

[1] A partnership was dissolved, and one partner continued to carry on the previous business, and was to settle the partnership business; such partner having subsequently paid to a creditor of the firm the amount due from himself separately, as well as from the firm: *Held*, that the retiring partner was discharged from the debt, though no appropriation was made at the time of payment. Baker *v.* Stackpoole, 9 Cow. 420.

A firm owed A. There was a change in its membership, after which A became debtor to the new firm. Until sued by it, A did not claim that the goods he got from the new firm were in satisfaction of the debt due him from the old firm. He made no inquiry for the names of the firm, but notice of the change had been published, from which he might have learned of the change: *Held*, that the new firm were authorized to charge the goods to A., and that he had no just claim to have such goods applied in satisfaction of his older claim against other partners of the firm. Hart *v.* Tomlinson, 2 Vt. 103.

Where several persons formed a partnership for the purpose of manufacturing woolen goods, with the understanding that they were to obtain an act of incorporation as soon as practicable, and they proceeded to manufacture cloth, and consigned it to the orators, a firm doing business in Boston, for sale, and became largely indebted to the orators, and then the act of incorporation was obtained, and most, but not all, of the members of the partnership became stockholders in the corporation, and the corporation took all the property and assumed all the debts of the partnership, and continued the business with the orators as it had been previously transacted, and the orators transferred to the account of the corporation the balance due to them from the partnership, and the corporation from time to time made large payments to the orators, exceeding the amount of that balance, and all persons concerned in the partnership continued to act in the faith of the merger of all their property and liabilities in the corporation, and of the final settlement of all the partnership concerns, and this was known to the orators, or might have been ascertained by reasonable inquiry, and business was

tomer of a firm of bankers has funds standing to his credit at the time they dissolve partnership, and his account is continued by their successors, they taking new deposits and honoring his drafts as if no change had occurred, and blending the accounts, then the payments first made by the new firm will be deemed to have been made in liquidation of the earliest item on the credit side of the customer's account, viz., the balance due to him at the time of the dissolution; and consequently, if, proceeding on this principle, that balance is liquidated, the customer has no claim against the old firm in respect of his account with them.

This doctrine is of such importance in questions relating to the discharge of retired and deceased partners, that one or two of the leading cases upon it may be usefully noticed.

Death of one partner and continuance of account with the others.

In Clayton's case (*p*) Clayton was a customer of a banking firm consisting of five partners. One of the partners, Devaynes, died, and the banking business was continued under the old name by the four surviving partners. At the time of Devaynes' death there was a balance of 1713*l.* due to Clayton on his cash *ac- *423 count with the bank. After Devaynes' death the continuing partners received and paid money on Clayton's account, and that account was not treated as two accounts, one with the old firm, ending on Devaynes' death, and the other with the new firm, beginning from that time, but as one entire and unbroken account. Some time after Devaynes' death the banking firm became bankrupt, and at that time there was a considerable sum due to Clayton, but the payments made by the bank on his account, after Devaynes' death, and before the bankruptcy, considerably exceeded the beforementioned balance of 1713*l.* Under these circumstances it was held that Clayton had no claim against Devaynes' estate in respect of this balance.

Clayton's case.

thus conducted by the orators and the corporation for nearly two years, and then upon the failure of the corporation, the orators commenced a suit against them, and took judgment therein for the entire amount due to them, and there was no pretense of fraud in effecting the transfer of this balance to the account of the corporation, it was *held*, that the orators could not revive their claim against the partnership, nor be allowed to recover from the members of it the balance due at the time of the transfer. Whitwell *v.* Warner, 20 Vt. 425.

(*p*) 1 Mer. 572.

Sterndale v. Hankinson. Executor continuing business.

In Sterndale *v.* Hankinson (*q*), a grocer died indebted for goods supplied. After his death, his widow and administratrix continued his business, and was supplied by her late husband's creditor with more goods. Upon the death of the husband, the account between him and the creditor was balanced, and a sum of 156*l.* was found due from the deceased. This balance was the first item in a new account opened with the widow, and this new account was continued by further sums debited to her for goods supplied, and by various sums credited to her in respect of payments made by her generally. These payments were more than sufficient to cover the first item of 156*l.*, but were considerably less than the whole amount standing to her debit. The creditor claimed the 156*l.* as a debt due from the estate of the deceased; but it was held that that debt was paid.

The rule is as applicable to retired as to deceased partners (*r*), and to those who are dormant, as well as to those who are known.

Retirement of dormant partner. Brooke v. Enderby.

In Brooke *v.* Enderby (*s*), Gilpin was an army agent, and was employed as such by the plaintiff, before and after the year 1807. In that year Enderby entered into *424 partnership *with Gilpin for ten years. The partnership ceased in 1817, but no notice of dissolution was given. The plaintiff, who knew nothing of this partnership, continued to deal with Gilpin, who carried on the business in his own name only, until he became bankrupt in 1819. Before and after 1807, Gilpin acted as the plaintiff's banker, and from time to time sent accounts to the plaintiff. No alteration was made in the accounts either when Enderby became a partner, or when he ceased to be one; but Gilpin's receipts and payments on the plaintiff's account, both prior and subsequent to Enderby's retirement, formed part of one general account. At the time of Enderby's retirement, a considerable balance was due to the plaintiff, and to recover this balance, the action was brought. Enderby paid into Court the amount of this balance, after deducting all sums paid by Gilpin on the plaintiff's account since the dissolution of partnership; and the Court held that the rule in Clayton's case applied,

(*q*) 1 Sim. 393. See, too, Smith *v.* Wigley, 3 Moo. & Sc. 174, where the same rule was applied to the case of a single partner continuing the business after a dissolution.

(*r*) See, as to retired partners, Hooper *v.* Keay, 1 Q. B. D. 178; where the two accounts were blended by the plaintiff.

(*s*) 2 Brod. & Bing. 70.

and that the plaintiff was not entitled to recover from Enderby anything beyond the money paid into Court.

So, in Newmarch *v.* Clay (*t*), the plaintiffs were creditors for goods supplied to a firm consisting of three partners, one of whom was dormant. The dormant partner retired, and, after his retirement, the plaintiffs supplied goods to the other partners, who continued to carry on the business in partnership together. The plaintiffs were not aware that the dormant partner had been a member of the firm, and there was only one continuous account between the plaintiffs and the acting partners. At the time of the retirement of the dormant partner, a balance was due to the plaintiffs, and after his retirement, and before any more goods had been supplied by the plaintiffs, bills were given them by the continuing partners generally on account. These bills were dishonored, and were ultimately given up for other bills, which were paid at maturity; but this was not until after more goods had been supplied by the plaintiffs. The plaintiffs sought to apply the proceeds of these last bills to the payment of the goods supplied since the dissolution, but it was held that those proceeds ought to be applied in liquidation of the balance due when the dormant *partner retired, inasmuch as the last bills *425 were given to take up the dishonored bills, and they had been given on account of that balance. In this case the rule in Clayton's case was, in fact, applied, but there were circumstances showing an actual intention that it should apply, and the decision proceeded on that ground.

Newmarch *v.* Clay.

It need hardly be observed, that the rule in Clayton's case applies to all accounts of the nature of one entire debit and credit account, without reference to any question of partnership, and is available not only by a firm against an old creditor, but also against a firm for the benefit of its debtors. For example, where a person becomes surety to a firm guaranteeing a debt owing to it by a third party, then, if the debt is an item in an account between this third party and the firm, and is liquidated by general payments with which he is credited, the debt guaranteed will be extinguished, and the surety will be discharged, although upon the whole account there may always have been a balance owing to the firm. (*u*) On the other hand, if the

Application of rule to all single running accounts.

(*t*) 14 East, 239.

(*u*) See Bodenham *v.* Purchas, 2 B. & A. 39; Field *v.* Carr, 5 Bing. 11; Pemberton *v.* Oakes, 4 Russ. 154; Toul-

guaranteed debt is not extinguished by the rule in question, the surety will not be discharged. (*x*) Moreover, the rule applies even as between persons who do not know that they are being affected by it, and who, if they did, might take care to exclude its operation. (*y*)

Rule applies against the debtor as well as against the creditor.

Further, as a creditor has no right to take the account subsisting between him and his debtor backwards, so as to make himself appear a creditor in respect of the earlier rather than of the later items of the account, so, on the other hand, a debtor, after making general payments in respect of one entire account, is not at liberty to have those payments applied in liquidation of the subsequent rather than of the earlier items.

*426 *In Beale *v.* Caddick (*z*), two partners, A. and B., were indebted to C., their banker, in a sum of 979*l.* C. transferred his business to another bank, and A. and B.'s account was, with A.'s assent, transferred to the new bank; and the first item in this account, to A. and B.'s debit, was the above-mentioned balance of 979*l.* Several sums were paid into the new bank by A. on account of himself and co-partner, and such payments were placed by the new bank to the credit of A. and B., in the usual way. The sums so paid in more than equalled the first item of 979*l.* on the debit side; but owing to payments made by the new bank on A. and B.'s account, there was a considerable balance due from them to the bank. The account as it stood from time to time appeared in the pass-book, and was never objected to by A. The deed by which C. transferred his business to the new bank gave the new bank an option, to be declared within a year, of taking or rejecting any of C.'s customers' accounts, and within the year the new bank gave notice to C., declining to take A. and B.'s account. The new bank having brought an action against A. and B. for the balance due on their account, the defendants contended that the first item standing to their debit was owing to C., and not to the new bank, which had declined to accept C.'s transfer of that

Beale *v.* Caddick.

min *v.* Copland, 3 Y. & C. Ex. 625, and Copland *v.* Toulmin, 7 Cl. & Fin. 350; Bank of Scotland *v.* Christie, 8 Cl. & Fin. 214; Medew's trust, 26 Beav. 588. Compare *Ex parte* Whitworth, 2 M. D. & D. 164; City Discount Co. *v.* Maclean, L. R. 9 C. P. 692, where, notwithstanding the mode in which the books were kept, the real intention was to keep the second debt separate from the others.

(*x*) Williams *v.* Rawlinson, 3 Bing. 71.

(*y*) Merriman *v.* Ward, 1 J. & H. 371; Scott *v.* Beale, 6 Jur. N. S. 559.

(*z*) 2 H. & N. 329.

debt; and that rejecting that item, there was nothing due to the plaintiffs. It was, however, held that, as between A. and B. and the new bank, the debt of 979*l.* had been conclusively taken into account, and that the items on the other side must be applied first of all in liquidation of that sum, and that the plaintiffs were therefore entitled to recover the balance due to them on the whole account.

This case has an important bearing on the position of incoming partners; for although they are not liable for debts contracted before they joined the firm, still if such debts and others subsequently contracted are allowed to form one single running account, and payments are made generally in respect of it, those payments, although made with the money of the new firm, will be applied to the old debt, and a balance will be left for which the incoming partner will be liable. (*a*)

Effect on incoming partner.

*The rule in Clayton's case, however, applies only to an entire unbroken account, and has no application to cases where one person is indebted to another in respect of several matters, each of which forms the subject of a distinct account. In such a case, if the debtor does not appropriate the payment when he makes it, the creditor is at liberty to apply the payment to whichever account he thinks proper. Moreover, when a change takes place in a firm by the retirement or death of a member, a creditor of the firm is under no obligation to assent to a carrying over of his debt, so that it shall form the first item in a fresh account with the new firm. He is at liberty to keep the accounts with the two firms distinct, and if he does so, payments made generally by the new firm will not necessarily go, by virtue of the rule in Clayton's case, in liquidation of the debt owing by the old firm. A remarkable illustration of this is afforded by the well-known case of Simson *v.* Ingham. (*b*) There, two country bankers, Benjamin and Joshua Ingham, gave a bond to a London bank, as a security for advances, which it might make on account of the per-

*427

Rule inapplicable where there are distinct accounts.

Right of appropriation in such a case.

Simson v. Ingham.

(*a*) See, also, Scott *v.* Beale, 6 Jur. N. S. 559. This case is badly reported, but it is tolerably plain that the incoming partner was held liable to pay, not the debt due to the plaintiff when the partnership commenced, but the balance of monies due to him on his whole account, and which balance consisted of monies received by the defendants after the partnership between them was created.

(*b*) 2 B. & Cr. 65.

sons constituting the country bank, or either of them, associated or not with any other persons. Benjamin died, and at his death a considerable sum was due to the London bank for advances made to the country bank. The London bank was in the habit of sending in monthly accounts to the country bank. In the month following Benjamin's death the London bank received and paid considerable sums on account of the country bank, and the sums were entered by the London bank in its own books in continuation of the former account between it and the old country bank. No account, however, was sent to the country bank until two months after Benjamin's death; and then two accounts were sent, one of them being an account of receipts and payments prior to his death, and the other being an account of receipts and payments made subsequently thereto. A considerable balance was due to the *428 London bank on the *first of these accounts, and to recover this balance an action was brought against Joshua's representatives. It was contended that his estate was discharged, by virtue of the rule in Clayton's case, the London bank having received since his death much more than sufficient to liquidate that balance; but it was held that the rule in question did not apply. The judgment of Mr. Justice Bayley contains such an admirable statement of the principles applicable to such cases that no hesitation has been felt in setting it out at length:

Simson v. Ingham.

"The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners, must be applied to the old debt. In that case, it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. In this case, the partner died in September, 1814. If in the ordinary course of business a monthly account had been sent in, stating the transactions before and after the death of the partner, as forming part of one entire account, and the balance is due from the survivors, in that case the creditor would have been precluded, and would have had no right to have said that the payments made subsequently to the death of the partner should be applied to any but the old account. In fact, the bankers in London did not send in any account after the death of the partner until November, and then they sent

in two distinct accounts, one made up to the day of the death of the partner, and the other commencing from that period. At that time, therefore, the bankers in London expressed their dissent from making the whole one entire account. It has been insisted that at that period of time they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he kept for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit. For these reasons, I am of opinion that the plaintiffs were not precluded from applying the payments to the new account, and therefore this award is right."

*The case of Simson *v.* Ingham was decided upon the principle that a creditor of a firm has a right, when a change occurs in the firm, to decide for himself whether the sum due to him from the old firm shall or shall not form an item in his account with the new firm. This principle is further illustrated by the case of Jones *v.* Maund. (*c*) There, three persons, A., B., and C. were partners, and D. was indebted to them in a sum secured by a covenant and a mortgage. A. and B. died, C. retired, and assigned her interest to E. who, with F., continued the business of the old firm under the old name. D. continued to deal with the new firm, and he made it several payments, more than sufficient to liquidate the debt above mentioned if appropriated thereto. The mortgage had been realized, and the sum arising from it had been applied in part discharge of the debt secured by it. There was nothing to show that D.'s debt had been made an item in the account between him and the new firm, and it was consequently held that D. had no right to insist that the payments made by him generally to the new firm should be applied to the balance due from him on his covenant. (*d*) *429

Right to blend accounts.

Jones *v.* Maund.

The right, however, of a creditor of a firm to allow accounts to be blended or to keep them distinct, cannot be exercised to the pre-

(*c*) 3 Y. & C. Ex. 347.

(*d*) The case was decided on demurrer, and according to the report, it was held that the balance due on the covenant could not be considered as liquidated, unless it could be shown that it had, *with C.'s assent*, been made an item in the account between D. and the new firm. But quære what C. had to do with it, she having assigned all her interest in the debt to the new firm? Did she not thereby authorize the new firm to deal with the debt as it liked? See Pemberton *v.* Oakes, 4 Russ. 154.

judice of a new partner without his consent, express or tacit. Without such consent the creditor has no right to appropriate a payment made by a new partner to a debt owing by somebody else, nor to run two distinct accounts together, and treat a general payment as made in respect of the earliest items. Burland *v.* Nash (*e*) may be referred to as an illustration of this. In that case A. succeeded B. in *business, and agreed with him to take his debts upon himself; A. then contracted debts of his own to one of B.'s creditors, and A. afterwards made such creditor a general payment on account; it was held that the creditor could not, without A.'s consent, apply this payment in discharge of the debt owing by his predecessor B.

Burland v. Nash.

*430

On the other hand, as has been seen, if the new partner or successor in business allows two accounts which he has a right to keep separate to be blended, the rule in Clayton's case will apply against him. (*f*)

It should be borne in mind with reference to cases of this description, that one partner can bind the firm by assenting to a transfer of a debt, due to or by it, from one account to another. (*g*)

Transfer of debt from one account to another.

The rule in Clayton's case, viz., that in current accounts it is presumably the sum first paid in that is first drawn out, or in other words, that presumably it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side, is a rule based on the presumed intention of the parties. (*h*) It is not, as is sometimes represented, a rule of law obtaining independently of their will; and, consequently, if it can be shown that some other appropriation was intended, the rule ceases to be applicable. An intention to appropriate a payment to a later rather than to an earlier item in the account, may be inferred from the usual course of business between the parties (*i*); from the source from which the

Rule in Clayton's case inapplicable where it defeats the intentions of the parties.

(*e*) 2 Fos. & Fin. 687. Quære whether the evidence did not warrant the inference that the two accounts had been run into one with the consent of the defendant.

(*f*) *Ante*, p. 426, Laing *v.* Campbell, 36 Beav. 3.

(*g*) *Ante*, p. 426; Beale *v.* Caddick, 2 H. & N. 326.

(*h*) Wilson *v.* Hurst, 4 B. & Ad. 767, *per* Lord Denman. In Copland *v.* Toulmin, 7 Cl. & Fin. 349, there was evidence to show an agreement for a different appropriation, but it was not deemed sufficient to exclude the rule.

(*i*) Taylor *v.* Kymer, 3 B. & Ad. 320; Lysaght *v.* Walker, 5 Bli. N. S. 1.

money was obtained (*k*); from the security to meet which the payment was made (*l*); from the fact that the earlier item was secured and intended to be kept separate from the others (*m*); from the fact that the payment was a dividend on *all debts (*n*); *431 from the representatian of the parties (*o*); and from other circumstances. (*p*)

An instructive case on this head is Wickham *v.* Wickham, (*q*) which in substance was as follows:—A firm of Finch and Sons, as agents of the plaintiffs, supplied goods to the firm of Smith and Wiley upon the terms that the latter should become debtors to the plaintiff in respect of such goods. Finch and Sons also supplied Smith and Wiley with other goods on their own behalf. In the accounts between Finch and Sons and Smith and Wiley, no distinction was made between goods supplied by Finch and Sons on their own behalf, and those which they supplied as agents of the plaintiffs. Smith and Wiley made payments generally on account; and applying the rule in Clayton's case, nothing was due from Smith and Wiley in respect of the goods supplied to them on behalf of the plaintiffs. However, Edward Finch was a partner in both firms, and representations were made to the plaintiffs by the firm of Finch and Sons to the effect that a large debt was due to the plaintiffs from the firm of Smith and Wiley, and Finch and Sons undertook that Edward Finch should use his influence as a partner in the firm of Smith and Wiley, to secure the reduction of such debt. Upon the faith of this representation and undertaking, the plaintiffs forbore to sue Smith and Wiley. It was held, that the firm of Smith and Wiley was precluded from treating its debt to the plaintiffs as liquidated by the payments made by it to the firm of Finch and Sons; for it was not competent to the two firms so to arrange their accounts as to liquidate a debt which a person who was a partner in both firms represented to the plaintiffs as still owing to them.

Wickham v. Wickham.

(*k*) Stoveld *v.* Eade, 4 Bing. 154; Thompson *v.* Brown, Moo. & M. 40.

(*l*) Newmarch *v.* Clay, 14 East, 240.

(*m*) City Discount Co. *v.* Maclean, L. R. 9 C. P. 692. See, *ante*, p. 425.

(*n*) *Ante*, p. 422.

(*o*) Wickham *v.* Wickham, 2 K. & J. 478; Merriman *v.* Ward, 1 J. & H. 371.

(*p*) See Henniker *v.* Wigg, 4 Q. B. 792. Compare *Re* Boys, 10 Eq. 467.

(*q*) 2 K. & J. 478. See, too, Merriman *v.* Ward, 1 J. & H. 371.

Upon the same principle, viz., that the rule in Clayton's case is founded on the presumed intention of the parties, it follows that it cannot be applied as against a person who is a creditor in respect of a fraud committed on him and of *which he is ignorant. This in fact was determined in Clayton's case itself. For Clayton, in addition to the claim which was held to have been discharged by the operation of the rule as noticed above (*r*), had another claim upon Devaynes' estate, arising out of a breach of trust committed by a fraudulent sale of some exchequer bills, and of which sale he was kept in ignorance. The payments made to Clayton since Devaynes' death were more than sufficient to satisfy both claims; but it was held, that the claim arising out of the concealed sale of the bills was not affected by those payments. (*s*) So if one partner fraudulently overdraws his account with the firm and keeps paying money in and drawing money out, so that his fraudulent overdrawing is never discovered, it will not be treated as having been made good so long as there is a balance against him. (*t*)

Application of the rule in cases of fraud.

*432

Before leaving the subject of appropriation of payments it may be as well to advert to a question of some difficulty which arises when a person indebted to a firm, and also to an individual member of it, pays him a sum of money under such circumstances that it cannot be ascertained on account of which debt the payment was made. In such a case ought the payment to be applied in liquidation of the debt due to the partnership, or of that due to the individual member? Pothier (*u*) says that good faith requires that the partner receiving the money, should apply it proportionately to both demands. The writer is not aware of any decision on this subject, but he apprehends that, as between the partner and the debtor, the payment might be applied to either debt at the option of the partner, whilst, as between the partner and his co-partners, good faith would require that the payment should be applied wholly to the partnership debt. (*x*)[1]

Imputation of payment where debts are owing to a firm and to a member of it.

(*r*) *Ante*, p. 422.
(*s*) See Clayton's case, 1 Mer. 572-580.
(*t*) Lacy *v.* Hill, 4 Ch. D. 555.
(*u*) Pothier, "Société," § 121.
(*x*) See Thompson *v.* Brown, Moo. & M. 40, and Nottidge *v.* Prichard, 2 Cl. & Fin. 379.

[1] Upon the general subject of appropriation of payments, Mr. Greenleaf in his valuable work on Evidence, Vol. 2, § 529, says: In regard to the ascription or appropriation of payments, the general rule of law is that a debtor owing several debts to the same cred-

*2. *Release.* *433

Release of one partner is a release of the firm.

Covenant not to sue has a different effect.

Both at law and in equity, a release of one partner from a partnership debt discharges all the others (*y*),[1] for where several persons are bound jointly, or jointly and severally, a release of one is a release of them all. (*z*) But in this respect a covenant not to sue differs from a release; for, although where there is only one debtor and one creditor, a covenant by the latter never to sue the former is equivalent to a release, it has been decided on several occasions that a covenant not to sue does not operate as a release of a debt owing to or by other persons besides those who are parties to the cove-

itor, has a right to apply his payment, at the time of making it, to which debt he pleases. But this rule applies only to voluntary payments, and not to those made under compulsory process of law. If he makes a general payment without appropriating it, the creditor may apply it as he pleases. And where neither party appropriates, the law will apply it according to its own view of the intrinsic justice and equity of the case."

Respecting the exceptions to the right of appropriation by the creditor, where the debtor makes none, the same author, in § 531*a*, says: "The principle on which these and other exceptions [stated in § 531] are founded, seems to be this: that the debtor, by waiving his right of appropriation in favor of the creditor, could not have intended that it should be exercised to his own injury; but, on the contrary, that he relied on the creditor's making an appropriation to which he could not reasonably or justly object. The creditor, therefore, never acquires the right to apply a payment with a view merely to his own interest or convenience, unless the debtor has had an opportunity to direct its application, by having the money pass through his own hands, or under his own control."

(*y*) Bower *v.* Swadlin, 1 Atk. 924; *Ex parte* Slater, 6 Ves. 146; Cheetham *v.* Ward, 1 Bos. & P. 630; Cocks *v.* Nash, 9 Bing. 341.

(*z*) See the last note, and as to joint and several obligations, Co. Lit. 232, *a*; Lacy *v.* Kinaston, 1 Ld. Raymond, 690; Kiffin *v.* Evans, 4 Mod. 379.

[1] See Gray *v.* Brown, 22 Ala. 262; Williamson *v.* McGinnis, 11 B. Mon. 74; Tudarman *v.* Newhall, 17 Mass. 581; American Bank *v.* Doolittle, 14 Pick. 126; Brown *v.* Marsh, 7 Vt. 327; Willings *v.* Consequa, Pet. C. C. 307, U. S. (*v*) Thompson, Gilpin, 614; Benson *v.* Kincaid, 3 Pa. St. 57.

A parol agreement to release one partner does not operate to discharge a debt as against the other. To have that effect it must be under seal. Evans *v.* Carey, 29 Ala. 99; Shotwell *v.* Miller, Coxe, 181; Walker *v.* McCulloch, 4 Me. 421; Shaw *v.* Pratt, 22 Pick. 305; Harrison *v.* Clare, 2 John. 449; Rowley *v.* Stoddard, 7 id. 207; Catskill Bank *v.* Messenger, 9 Cow. 37; De Zeng *v.* Bailey, 9 Wend. 336; Lunt *v.* Stevens, 24 Me. 534.

A partner cannot avail himself of a promise by a creditor of his firm to release him from liability, if he has paid the creditor nothing and has not parted with any security, or acted upon the faith of the promise. Fagg *v.* Hambel, 21 Iowa, 140.

A creditor who has accepted his pro-

nant. (*a*) *A fortiori* will an agreement to indemnify certain shareholders in an incorporated company be no defense to a claim against the company itself. (*b*)

Releases in form held to be covenants not to sue.

If a release is so drawn as to show beyond all doubt that it was intended to enure only for the benefit of the releasee personally, and not to avail even him in an action by the releasor against the releasee, jointly with other people, then persons jointly liable with him in respect of the debt released will not be discharged therefrom. In such a case the deed will itself show that it was not in fact intended to operate as a release.[s]

portion of an assignment made by a firm, and given the firm a release, has no right of action against a former partner of the firm who retired before the assignment was made, and received from the firm a bond of indemnity against all debts. Bank of Wilmington *v.* Almond, 1 Whart. 169.

Where a firm debt contracted in Pennsylvania, and judgment therefor is recovered in that State against one partner alone, and afterwards a release is executed to the other partner in another State, the effect of the release upon the judgment is to be determined by the law of Pennsylvania. Greenwald *v.* Kaster, 85 Pa. St. 45.

(*a*) Clayton *v.* Kinaston, 2 Salk. 573; Lacy *v.* Kinaston, 1 Lord Raymond, 688, and 2 Salk. 575; Hutton *v.* Eyre, 6 Taunt. 289; Dean *v.* Newhall, 8 T. R. 168; Walmesley *v.* Cooper, 11 A. & E. 216, and see Price *v.* Barker, 4 E. & B. 760.

(*b*) Shaw's claim, 10 Ch. 177.

[s] See Greenwald *v.* Kaster, 85 Pa. St. 45; Parmelee *v.* Lawrence, 44 Ill. (Callaghan & Co.'s ed.) 405 and note; Seymour *v.* Butler, 8 Iowa, 304; Kirby *v.* Taylor, 6 John. Ch. 242; Clagett *v.* Salmon, 5 Gill & John. 351; Lysoght *v.* Phillips, 5 Duer, 116; Wiggin *v.* Tudor, 23 Pick. 444; R. M. Charlt. 267; Gardner *v.* Baker, 25 Iowa, 343; Bank of Chenango *v.* Osgood, 4 Wend. 607; Hosack *v.* Rogers, 8 Paige, 229; Couch *v.* Mitts, 21 Wend. 424; Chandler *v.* Herrick, 19 John. 129; Shed *v.* Pierce, 17 Mass. 623; Goodnow *v.* Smith, 18 Pick. 416; Mason *v.* Jonett, 2 Dana, 107; McClellan *v.* Cumberland Bank, 24 Me. 566.

The payee of a bill of exchange, drawn by a firm of which he was a member, indorsed the same to his creditor in trust to pay certain other creditors. He afterwards assigned all his property to the indorsee for the benefit of all his creditors, with a stipulation for a release from them. The assignee, in his private capacity, executed such release to the debtor: *Held*, that this did not release his claim upon the other members of the partnership, as indorsee of the bill. Hazelhurst *v.* Pope, 2 Stew. & P. 259.

The plaintiff and defendant were partners, and the defendant, having received money on the partnership account, mingled it with money held by him and A in trust, and allowed it to pass into A's hands. The plaintiff afterwards having been wrongfully kept in ignorance by the defendant, of the receipt and disposition of the money, released A.: *Held*, that the defendant was accountable to plaintiff for the money so received, notwithstanding the release to A. Mumford *v.* Murray, 6 Johns. Ch. 452.

In Solly *v.* Forbes (*c*) the defendants, Forbes and Ellerman, were partners, and were indebted to the plaintiffs, and had stopped payment. In consideration of a sum paid by Ellerman, the plaintiffs released him from all further demands, but it was declared in the release (to which, however, Forbes was *not a party), that nothing therein contained should affect the plaintiffs' rights against Forbes, either separately or as partner with Ellerman, or against the joint estate of the two; and that it should be lawful for the plaintiffs to sue Ellerman, either jointly with Forbes, or separately, for the purpose of obtaining satisfaction of their debt, either out of the joint estate of the two, or from Forbes. In an action brought by the plaintiffs against Forbes and Ellerman to recover the debt owing by them, it was held that this deed was no bar to the action. Solly *v.* Forbes. *434

Again, in Hartley *v.* Manton (*d*), where a bill was drawn by a firm on, and was accepted by, one partner, it was held that a release of the drawers did not discharge the acceptor; the object of the release being to discharge the joint liability of the firm, but not to affect the several liability of the accepting partner. Hartley *v.* Manton.

In construing releases particular attention must be paid to the recitals; for, however general the operative words of the deeds may be, they will be confined so as not to affect Recitals of releases.

Where a partnership closed up its business, and all the goods, effects and credits were left with P., one of the partners, for the purpose of paying off the debts, and this partner entered into an agreement with some of the creditors that they should take P.'s notes indorsed by R., who was not a member of the firm, for 40 cents on the dollar of their indebtedness, and the creditors thereupon released to P. all right to resort to any of the goods and effects, and the goods were mortgaged to R. to secure his indorsement, and a covenant was entered into by the creditors not to sue P. for twenty years, and P. and R. afterwards disposed of the goods: *Held*, that the other partners were liable to the creditors to the amount of the partnership indebtedness to them, less the notes for 40 per cent, Roberts *v.* Strang, 38 Ala. 566.

The fact that the consideration paid by one of several partners, upon a compromise made by him for his release from a debt owing by the firm under the New York act of 1838, authorizing an individual member of a partnership to compromise his individual liability in case of a dissolution, was taken out of the co-partnership funds which he had in his hands, will not make such release inure to the benefit of the other members of the firm, or deprive the creditor of the protection of the statute. Stitt *v.* Cass, 4 Barb. 92.

(*c*) 2 Brod. & Bing. 38. See, too, Price *v.* Barker, 4 E. & B. 760; Thompson *v.* Lace, 3 C. B. 540; Willis *v.* De Castro, 4 C. B. N. S. 216; Bateson *v.* Gosling, L. R. 7 C. P. 9.

(*d*) 5 Q. B. 247.

more than the parties appear from the deed itself to have contemplated. (*e*)

Removing seal.

If several persons are bound by a bond jointly, or jointly and severally, and their creditor removes the seal of one of them from the bond, all the others are discharged; but if the obligors are only bound severally, and in no sense jointly, then the removal of the seal of one of them does not affect the liability of the others. (*f*)

Arrest.

Before arrest for debt was abolished (as it now is except in a few special cases) an arrest of a debtor, followed by a discharge of him by the arresting creditor, was equivalent to a release by the creditor of his debt; whence it followed that if a creditor of a firm obtained judgment against it, and arrested the partners, and then let one of them go, the others were entitled to be discharged from custody. (*g*)[1]

*435 *It has been decided that if a creditor accepts a composition in bankruptcy in respect of a joint debt, he is not precluded from suing one of the debtors who may be separately liable to him in respect of the same debt. (*h*)[2]

Composition in bankruptcy.

Receipt in full.

A receipt given to one partner in satisfaction of all demands against him, will not discharge his co-partners unless that also was intended. (*i*)

3. *Substitution of debtors and securities.*

A liability which is originally joint and several, may be extinguished by being replaced by a liability of a different nature; and this may happen in one of two ways, viz., either by an agreement to that effect come to between the parties liable and the per-

(*e*) See, for illustration of this rule, Lindo *v.* Lindo, 1 Beav. 496; Payler *v.* Homersham, 4 M. & S. 423; Simons *v.* Johnson, 3 B. & Ad. 175; Boyes *v.* Bluck, 13 C. B. 652; Lampon *v.* Corke, 5 B. & A. 606.

(*f*) See Collins *v.* Prosser, 1 B. & C. 682.

(*g*) Ballam *v.* Price, 2 Moo. 235.

[1] See Abel *v.* Forgue, 1 Root, 502.

(*h*) Simpson *v.* Henning, L. R. 10 Q. B. 406; Megrath *v.* Gray, L. R. 9 C. P. 216. Wilson *v.* Lloyd, 16 Eq. 60, *contra*, must be considered as overruled on this point; Cragoe *v.* Jones, L. R. 8 Ex. 81, was a case of a surety.

[2] See Hill *v.* Trainer, 47 Wisc. 537.

(*i*) *Ex parte* Good, 5 Ch. D. 46, where one partner was a nominal partner, and not, therefore, liable to indemnify the others.

son to whom they are liable (*k*); or by virtue of the doctrine of merger, independently of any such agreement.

(*a*) *Of substitution by agreement.*

Extinction of liability by substitution of debtors.

In order that one liability may be extinguished by being replaced by another by agreement, it is essential that the person in whom the correlative right resides should be a party to the agreement, or should, at all events, show by some act of his own that he accedes to the substitution. If A., being indebted to B., transfers his liability to C., and B. does not assent to the transfer, his rights are wholly unaffected; he will neither acquire any right against C. nor lose his former right against A. As regards B. the agreement between A. and C. is *res inter alios acta*, and it does not in any way benefit or prejudice him. But if B. assents to the arrangement come to between A. and C., and adopts C. as his debtor instead of A., then A.'s liability to B. is at an end, and B. must look for payment to C. and to him alone. (*l*)[1]

(*k*) Sometimes called Novation, but nothing is really gained by using this word.

(*l*) See *per* Buller, J., in Tatlock *v.* Harris, 3 T. R. 180.

[1] See *ante*, 392 and note. Hayes *v.* Know, 41 Mich. 529; Rawson *v.* Taylor, 30 Ohio St. 389, and the cases cited below.

When a partnership is dissolved by the retirement of one of the partners, and is succeeded in business by a new partnership, composed partly of the remaining partners, the retiring partner is not discharged from liability for the debts of the old partnership, in the absence of an agreement, express or implied, with the creditors; and neither the failure of a creditor to demand payment of him, for a period of time less than that prescribed as a bar by the statute of limitations, nor a demand of payment from the new firm, nor the receipt of interest, or even a partial payment of his debt from the new firm, nor all these facts combined, necessarily establish such an agreement; though they are proper evidence to be submitted to the jury, under appropriate instructions from the court, as relevant to the question whether such agreement in fact existed. Hall *v.* Jones, 56 Ala. 493. See, also, Knox *v.* Hayes, 2 N. W. Rep. (N. S.) 670.

In an action against the retiring partner, by a creditor of the old co-partnership, the *onus* is on the defendant to prove his discharge, either by express agreement, or by facts from which an agreement will be implied. Hall *v.* Jones, 56 Ala. 493.

Such an agreement need not be in writing. Hopkins *v.* Carr, 31 Ind. 260; Schwindler *v.* Euell, 45 How. Pr. 33.

A, of London, gave a letter of credit to to B & C, of Boston, who thereupon drew bills on A, which he accepted and paid. B had other accounts with A, in which

*436 *To apply this to cases of partnership, let it be supposed that a firm of three members, A., B., and C., is indebted to D.; that A. retires, and B. and C. either alone, or together with a new partner, E., take upon themselves the liabilities of the old firm. D.'s right to obtain payment from A., B. and C. is not affected by the above arrangement,

Agreement between partners does not affect creditors.

C had no concern; C had funds in the hands of B, and requested B to remit to A and close the account of B & C. B afterwards made a remittance to A, and advised him by letter of other forthcoming remittances, and requested him to apply the sum which was actually remitted, to B's account generally, and place the bills which A had accepted and paid for B & C to B's debit. This letter was shown to C before it was forwarded to A. A replied that he had received B's letter and "noted the contents." This letter was also shown to C. Before this letter was received, B failed, being largely indebted to C; and in about seventy days after the letter was written, A suspended payment, not having, in his correspondence, again alluded to B's request to debit him with the bills accepted and paid for B & C. About four and a half months after said letter was written A forwarded his account against B & C, and it was put in suit: *Held*, that A had not, by the terms of his letter to B, agreed to discharge C, and look for payment to B alone; that there was no consideration for such agreement, if it had been made; and that A was entitled to recover of B & C. Wildes *v.* Fessenden, 4 Metc. 12.

Defendant O., a commission merchant of Milwaukee, received from plaintiff, a resident of Minnesota, a quantity of wheat and grass seed on consignment, with directions to hold in store, to sell when ordered, and to account for the proceeds, after deducting the usual commission charges and advances made thereon. Before any order for a sale was given the defendant P. became a partner in the business with O. Notice of this fact was thereupon given to plaintiff, both by the firm and by P. in person, and plaintiff was given to understand and made to believe by accounts rendered in the name of the firm from time to time, and otherwise, by the defendants, that the account between him and O., together with the property which was the subject of the consignment, had been transferred to the firm, and that the latter was holding and carrying it for him under the original instructions given to O. Relying upon this state of facts, believed to be true, plaintiff, from the receipt of the notice of the partnership, ceased to regard O. as his factor in respect to the consignment, and ever afterwards looked to and treated the firm as alone occupying that relation in place of O. Trusting to the responsibility of the firm alone, he withheld any order for a sale for some months, when, upon giving it, he was informed for the first time by P. that O. had then become insolvent, and that the firm had then become insolvent, and that the firm had never, in fact, taken possession of the wheat as represented, but that it had been converted by O. to his own use prior to the formation of the co-partnership: *Held*, in an action against the defendants for a conversion of the wheat as co-partners, that they were both estopped from denying the truth of the facts thus falsely represented, upon the faith of which the plaintiff had acted. Coleman *v.* O'Neil, 1 N. W. Rep. 846.

The fact that one member of a partner-

and A. does not cease to be liable to him for the debt in question. (*m*) But if, after A.'s retirement, D. accepts as his sole debtors B. and C., or B., C., and E. (if E. enters the firm), then A.'s liability will have ceased, and D. must look for payment to B. and C., or to

ship which has executed its promissory note has, with the consent of the payee, retired from the firm, and has transferred his interest to the other members, who have assumed the firm debts, does not relieve him from liability on the note. Clark v. Billings, 59 Ind. 508.

Where a partnership is dissolved, and the partner continuing the business assumes the liabilities of the firm, and publishes notice that he will pay them, the other partners are nevertheless liable to a creditor who did not present his claim in the manner directed by the notice. Umburger *v.* Plume, 26 Barb. 461.

A and B dissolved partnership, and by the agreement of dissolution, A was to pay the debts of the concern. C, a creditor of the firm, assented to this arrangement, and promised to give up the partnership note and take that of A alone, but this was not done: *Held*, that B was not released. Frentress *v.* Markle, 2 G. Greene, 553.

On the dissolution of a partnership, it was agreed between the partners that one of them should assume and pay the partnership debts. A creditor, on being afterwards informed of the arrangement, replied that he was satisfied with it: *Held*, that such reply was not such evidence as would warrant the jury in finding that he had discharged the other partner. Chase *v.* Vaughan, 30 Me. 412.

Where, after the dissolution of a partnership between W. and C, a creditor of the firm stated an account in which they were cnarged with certain goods purchased by them, and at the same time stated a separate account of his dealings with W., who had assumed the adjustment of the partnership concerns, in which account W. alone was charged with another partnership debt: *Held*, that C was not discharged from such other partnership debt thereby; but that, whether he was discharged or not, no one but C could avail himself thereof; and a note given by C, either by way of security or satisfaction of such debt, would be founded on a good consideration. Averill *v.* Lyman. 18 Pick. 346.

A and B were partners; and, upon the dissolution of the firm, B retained the assets, and agreed to pay the debts of the firm. A alleged that, by an agreement between him and the agent of the creditor, a judgment rendered against the firm was to be in his control, for the purpose of collecting it from the property of B: *Held*, that A had the burden to sustain the agreement; and that, under the facts of the case, A's property would be liable for the satisfaction of the judgment. Aiken *v.* Thompson, 43 Iowa 506.

The plaintiff was employed by the firm of A & B to procure orders for certain machinery, of which they were manufacturers, upon the agreement that he should have a certain commission on the amount of all orders procured through him. The plaintiff commenced negotiations with D for a sale to him of such machinery, and while they were pending A and B dissolved partnership and by agreement between them A assumed (for his sole benefit) performance of all co-partnership engage-

(*m*) Smith *v.* Jameson, 5 T. R. 601; Rodgers *v.* Maw, 4 Dowl. & L. 66; Dickenson *v.* Lockyer, 4 Ves. 36; Cummins *v.* Cummins, 8 Ir. Eq. 723.

B., C., and E., as the case may be. When, therefore, a partner has retired, and a creditor of the firm continues to deal with the continuing partners and such other persons, if any, as may have become associated with them in partnership, it is of great importance

ments theretofore entered into by the firm and remaining unperformed. Subsequently A formed a partnership with C, and the firm of A and C obtained from D. an order for machinery in consequence of the original negotiations of the plaintiff with him: *Held*, that the plaintiff was entitled to his commissions on the order and could maintain an action against A therefor; that the fact that A had associated another person in the business with him had no effect on his liability, and that he was liable to the same extent as if he had gone on alone in the business. Sinclair *v.* Galland, 8 Daly, 508.

Under Stat. 1865, ch. 113, a creditor's proof of his claim and acceptance of a dividend under an order distributing, among the joint and several creditors alike, the estate in insolvency of a partner, who, on the dissolution, had agreed to pay the partnership's outstanding debts, bars any right of action on the debt against the other partner, although, after the dissolution, he has changed his domicile to the creditor's state. Bucklin *v.* Bucklin, 97 Mass. 256.

Where one partner sells his share in the partnership stock to a stranger, and receives payment therefor, and the purchaser becomes a partner in the concern, such purchase and payment will not have the effect to relieve the share of the stock of the remaining partner from liability for the debts of the old firm. Nixdorf *v.* Smith, 16 Pet. 132.

A and B, as co-partners, gave a note to C, and afterwards the co-partnership was dissolved. B agreeing to pay all the debts, and B and C formed a co-partnership: *Held*, that this did not operate as an extinguishment of the note, unless it was so expressly agreed between B and C, at the time their co-partnership was formed, and although it was alleged that this note was to form a part of C's stock in the firm. Mitchell *v.* Dobson, 7 Ired. Eq. 34

Where the individual debts of one partner are assumed by the firm (being insolvent), proof beyond controversy will be required that the transaction was honest, for a valuable consideration, and for the benefit of the partnership. Even then the power is doubtful. Keith *v.* Fink, 47 Ill. 272.

A judgment was confessed by D, in favor of a firm consisting of A, B and C, to secure future advances. Three years afterwards C withdrew from the firm, A and B purchasing his interest. The new firm continued to make advances, charging them and giving credit for payments, etc., as before, no change being made in the books. The judgment was entered up by A and B, and was the first lien on D's land: *Held*, that the judgment secured the advances made by the old and the new firm. Shenk's Appeal, 33 Pa. St. 371.

In an action by a surviving partner, where the declaration contained the usual common counts, in the form prescribed by the act of 1856, ch. 112, and a special count on an agreement, the evidence consisted of accounts between the original firm of the plaintiff and its successors acting as agents of the defendant and the defendant, and the written agreement: *Held*, that the accounts should not be excluded, on the ground that the plaintiff must prove an acknowledgment of indebtedness on the part of the defendant; and that it was competent for the jury to find, from the facts proved, whether there was an assignment or transfer of the accounts

to ascertain whether the creditor has or has not accepted the new firm as his debtors, in lieu of the old firm. If he has, the retired partner's liability will have ceased, whilst if he has not, it will still continue.

Nothing used to be more common than for promoters of companies to put forward a prospectus in which it was said that all liability on the part of a shareholder would cease on a transfer of his share; but the hope thus held out was as false and delusive as that intended to be raised by the assertion that the liability of the shareholders would be limited to the amount of their shares. (*n*) It cannot be too often repeated that, merely by retiring, a partner or a shareholder gets rid of no liability as to past transactions, unless there is some statutory enactment applicable to his case; and the same observation applies to a total dissolution. To use the words of Mr. Justice Heath, "when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues, and always must continue." (*o*) [1]

Liability not got rid of by transferring share.

*The cases which bear upon the question of discharge by virtue of a substitution by a creditor of one debtor for another will be found, notwithstanding some conflict between them, to be all professedly based on the foregoing principles and on a few simple rules, the most important of which are as follows: *437

1. There is no *à priori* presumption to the effect that the creditors of a firm do, on the retirement of a partner, enter into any agreement to discharge him from liability.

Creditors not presumed to discharge outgoing partners.

2. An agreement by a creditor of several persons, liable to him jointly, to discharge one or more of them, and look only to the others, is not necessarily invalid for want of consideration. (*p*) [1]

Creditor may agree to look only to continuing partners.

from the old firm to the new, and whether the defendant assented to it, and promised, expressly or impliedly, to pay the balance to the plaintiff. Stewart *v.* Rogers, 19 Md. 98.

(*n*) See Blundell *v.* Winsor, 8 Sim. 613.

(*o*) Wood *v.* Braddick, 1 Taunt. 104. Therefore, partners continue liable on the covenants entered into by them in a lease of the partnership premises, although the firm may have been dissolved since the lease was granted. See Hoby *v.* Roebuck, 7 Taunt. 157; Graham *v.* Wichelo, 1 Cr. & M. 188.

[1] See *ante*, 417, note.

(*p*) Lyth *v.* Ault, 7 Ex. 669, has set-

[1] See *post*, 449 and note.

3. Except under special circumstances, a creditor who discharges one partner discharges all. (*q*) Consequently, if a creditor discharges a retired partner, and acquires no fresh right to obtain payment from the others, either alone or with a new partner, the creditor will be altogether remediless. One test, therefore, by which to determine whether a retired partner has been discharged, is to see whether the creditor has obtained a new right to demand payment; for if he has not, no discharge can possibly be made out by any evidence which fails to establish an extinguishment of the creditor's demand altogether.

Effect of doctrine that a release of one partner is a release of all.

It is proposed now to examine the cases relating to the liability of retired partners for debts incurred before their retirement. They may be conveniently classified thus:—

Classification of cases.

A. Cases in which a retired partner has not been discharged;
   (*a*) No new partner having been introduced into the firm.
   (*b*) Although a new partner has been introduced into the firm.

B. Cases in which a retired partner has been discharged.

After these cases have been examined, the analogous cases relating to the discharge of the estate of a deceased partner will be noticed.

*438 *CLASS A *a*.—CASES IN WHICH A RETIRED PARTNER HAS NOT BEEN DISCHARGED, NO NEW PARTNER HAVING BEEN INTRODUCED INTO THE FIRM.

The strongest cases of this class are Lodge *v.* Dicas (*r*), and Davis *v.* Ellice. (*s*) In each of these a partnership had been dissolved, one member retiring and the other continuing the business, and agreeing to pay the debts of the old firm. In each case the plaintiff knew of the arrangement, and his debt was transferred with his consent to the books of the new firm. In each case, moreover, there was strong evidence to show that the plaintiff had agreed to discharge the retired member, and to look only to the others. But in each it was

Promise to look only to continuing partners.

Lodge *v.* Dicas.

David *v.* Ellice.

tled that an agreement by a creditor of several joint debtors to accept the sole and separate liability of one of them and to discharge the others is not invalid for want of consideration.

(*q*) *Ante*, p. 433.

(*r*) 3 B. & A. 611.

(*s*) 5 B. & C. 196, and 1 C. & P. 369.

held that the retired partner continued liable, and that the plaintiff had done nothing to discharge him; and the fact that no person had become liable to the plaintiff who was not so originally, was relied upon by the Court as showing that there was no consideration for the alleged discharge. (*t*)

These two cases have been much criticised (*u*), and they certainly went too far; for the proposition that a creditor of a firm cannot, for want of consideration, abandon his right against a retiring partner, and retain it against the others, unless they give some fresh security, has been shown to be erroneous, and is now exploded (*x*); and there can be little doubt that if similar cases were to arise again, and the jury found for the defendant, the verdict would not be disturbed. Observations on these cases.

This appears from Thompson *v.* Percival. (*y*) In that case, the defendants, Charles Percival and James Percival, had as partners become indebted to the plaintiff. The partnership was dissolved, and it was agreed that the business should be carried on by James, and that he should receive and pay all debts, and assets sufficient to pay debts of the firm were left in his hands. The plaintiff, on applying to James for *payment, was told that he must look to him, James, alone, *439 and the plaintiff accordingly drew a bill on James, and the bill was accepted by him. The bill being afterwards dishonored, the plaintiff sued both James and Charles for the original debt, and obtained a verdict for the full amount; but the defendants had leave to move for a nonsuit if the Court should be of opinion that Charles had been discharged. The Court, without deciding that point, held that the question ought to have been left to the jury, and a new trial was therefore directed. The Court held that the facts proved raised a question for the jury, whether it was agreed between the plaintiff and James that the former should accept the latter as his sole debtor, and should take the bill of exchange accepted by him alone, by way of satisfaction for the debt due from both. If it was so agreed, the Court thought that the agreement and receipt of the bill would be a good answer on the part of Charles by way of accord and satisfaction. (*z*) Thompson *v.* Percival.

(*t*) See, too, Thomas *v.* Shillibeer, 1 M. & W. 124.

(*u*) See 5 B. & Ad. 933; 2 Cr. & M. 623; 2 M. & W. 493.

(*x*) *Ante*, p. 437, note (*p*)

(*y*) 5 B. & Ad. 925.

(*z*) In Evans *v.* Drummond, 4 Esp. 89, and Reed *v.* White, 5 ib. 122, a re-

It is not unusual to represent Lodge *v.* Dicas and David *v.* Ellice, as altogether overruled by Thompson *v.* Percival, and other cases. This, however, is not quite correct. The three cases together establish (1.) that a creditor who treats the continuing partners as his debtors, does not necessarily abandon his right to resort to a retired partner for payment; (2.) that whether he does or does not is a mixed question of law and fact which ought to be submitted to a jury;[1] and (3.) that their verdict will not be disturbed by the Court upon the grounds acted on in Lodge *v.* Dicas and David *v.* Ellice.

Effect of these three cases.

That a creditor who treats the continuing partner as his debtors, does not without more discharge a retired partner, is shown by other cases, and especially by those in which the continuing partners have paid interest on the old debt at a rate, or in a manner, differently from that previously adopted.[2]

Treating continuing partners as debtors.

An old case on this head, and one often referred to, is Heath *v.* Percival (*a*), in which two partners indebted to the plaintiff on a bond dissolved partnership. One of *440 them continued to *carry on the business, and took upon himself the partnership debts, and public notice was given that the creditors of the firm were either to come in and be paid their debts, or to look for payment to the continuing partner only. The plaintiff came in, but instead of being paid off, he kept the bond, receiving interest at 6*l.* instead of 5*l.* per cent. It was held that he did not thereby discharge the retired partner from his liability to pay the bond with interest at 5*l.* per cent.

Heath *v.* Percival.

Moreover, if the continuing partners give a new security for the old debt, this will not operate to discharge the retired partner, unless the creditor intended that such should be the case, or unless the new security is of such a nature as to merge the original debt.[1] In Bedford *v.* Deakin (*b*), three partners were indebted to the plaintiff on bills of

Taking a new security from them.

Bedford *v.* Deakin.

tiring partner was held discharged on the ground here referred to. See *post*, p. 443.

[1] See Knox *v.* Hayes, 2 N. W. Rep. (N. S.) 670.

[2] See Hall *v.* Jones, 56 Ala. 493.

(*a*) 1 P. Wms. 682, and 1 Str. 403.

(*b*) 2 B. & A. 210. See, too, Swire *v.* Redman, 1 Q. B. D. 536, where the plaintiff had not expressly reserved his rights against the retired partner. See, also, Featherstone *v.* Hunt, 1 B. & C. 113; Spenceley *v.* Greenwood, 1 Fos. & Fin. 297. Compare Evans *v.* Drummond, 4 Esp. 89, noticed *infra*, p. 443.

[1] A note given by one partner after dissolution, for a debt of the firm, is not an extinguishment or satisfaction of the

exchange. They dissolved partnership, and arranged between themselves that one of them should pay the plaintiff. The plaintiff was informed of this arrangement, and took from one of the partners his separate promissory note, indorsed by a third party, for the

original debt, so as to discharge the other partner, unless such was the agreement when the note was given; and this is a fact for the determination of a jury. Mason *v.* Wickersham, 4 Watts & S. 100; Bernard *v.* Torrance, 5 Gill & John. 383; Davis, Estate *v.* Desauque, 5 Whart. 530; Leabo *v.* Goode, 67 Mo. 126; Folk *v.* Wilson, 21 Md. 538. See, also, Tyner *v.* Stoops, 11 Ind. 22; Bowyer *v.* Knapp, 15 W. Va. 278; *In re* Parker, 19 Nat. Bank Reg. 340; Hill *v.* Marcy, 49 N. H. 265; Townsends *v.* Stevenson, 4 Rich. 59; Landolfo *v.* Appleton, 40 N. Y. 533. See, however, Harris *v.* Lindsay, 4 Wash. 98, 271; Arnold *v.* Camp. 12 John. 409; where, however, the firm note was surrendered.

The rule is the same, even though such note is signed by a surety. Varnell *v.* Andereon, 14 Miss. 619.

Where the creditor of a firm takes the notes of the surviving partners for the amount of his claim, or a judgment against them for the same, he does not release the estate of the deceased partner, unless it is so agreed at the time. Collier *v.* Leech, 29 Pa. St. 404; Titus *v.* Todd, 25 N. J. Eq. 458.

The *onus* of showing that it is an extinguishment lies upon those who allege it; and it is not necessary for them to show a special contract to that effect, or that the joint note was given up; and even where that is the case, the presumption may be rebutted by countervailing proof. Estate of Davis *v.* Desauque, *supra*.

To convert a partnership into a partner's separate debt, the intention so to do must clearly appear. There must be a deliberate and mutual assent of creditor and debtor. The creditor may take the partner's separate liability without necessarily extinguishing that of the firm. Montross *v.* Byrd, 6 La. Ann. 519.

The taking of a renewal note from one who had dormant partners, when the original was given, after the termination of the partnership, and without any intention to discharge the dormant partners, does not discharge the claim against the co-partnership. Parker *v.* Canfield, 37 Conn. 250.

Where the new notes are signed like those first given, and the creditor is ignorant of any change in the partnership, no agreement to discharge can be inferred. Bernard *v.* Torrance, *supra*.

Where a creditor of the firm of F. & S. had, after its dissolution, refused to accept the paper of S. and discharge F., his receiving and retaining what purported to be the paper of the late firm of F. & S. without knowing that it was signed by S. alone in the firm name without authority, is not such an acceptance and discharge, when he had not accepted any paper as payment, nor unduly delayed enforcing his claim. Adler *v.* Foster, 39 Mich. 87.

A new promissory note given by a new firm upon taking up a note of the old firm, comprising members not in the new firm, operates as payment upon condition that the note proves to be productive, and if the creditor makes an absolute sale and transfer of the note or of a judgment upon it, without the assent of the old firm, and then treats it as his own, he must be deemed to have elected to take it as payment, even if he receive less than the amount due upon it. Hill *v.* Marcy, 49 N. H. 265.

A. and T. were partners. It was claimed that the firm had been virtually dissolved, but there was no evidence of

amount of the debt, but expressly reserved his right to look to all three partners for payment, and the plaintiff retained the bills already in his possession. The notes when due were taken up by other bills, and they in their turn were several times renewed. Ul-

the cancellation of the partnership agreement, nor any sufficient evidence of public or private notice of its dissolution to persons trading with T. T. gave to S. his individual note, upon which this action against A. was brought. It was in evidence that A. recognized the existence of a liability upon him for the debt, he having repeatedly promised to pay the whole debt, and having partly with his own and partly with means of the firm, paid nearly half of it, and having appropriated to his own use a portion of the proceeds of the cattle, which were the consideration upon which the note was given: *Held*, that the note was given and accepted, not merely as the individual promissory note of T., but was meant as an obligation for and on behalf of the firm for the price of the cattle, and that its acceptance did not exonerate A. by merging the firm liability in the note of the individual partner. Smith *v.* Turner, 9 Bush, 417.

Pending the dissolution of a partnership, a creditor received the notes of the several partners for their respective portions of a partnership debt standing on an open account, agreed to release each partner from any other portion of the debt than that covered by his note, and accepted the notes as a full discharge of each partner from the residue of the account: *Held*, that the contract was binding on the creditor, and that he could not maintain a suit on the account against a partner who had paid the note so accepted for his share of the debt. Maxwell *v.* Day, 45 Ind. 509; Crooker *v.* Crooker, 52 Me. 267; Luddington *v.* Bell, 77 N. Y. 138; Bowyer *v.* Knapp, 15 W. Va. 278.

As between a co-partnership and a creditor thereof, a note given in the firm name, without authority, by one partner, after dissolution, for a debt of the firm, the parties to the note intending to bind, and believing the note was binding on the firm, will not extinguish the firm debt. Gardner *v.* Conn, 34 Ohio St. 187. See, also, Turnbow *v.* Broach, 12 Bush, 455.

As between the partners themselves, such transaction will not discharge the non-consenting partner from liability to make contribution to the partner paying the debt. Gardner *v.* Conn, *supra*.

Where a retiring partner surrendered all the assets of the firm at its dissolution to the continuing partner, under an agreement that the latter should pay the debts of the firm, and notified the creditors of the firm of such dissolution and agreement: *Held*, that he was thereafter liable for the firm debts only as security, and that a firm creditor who accepted from the remaining partner his individual notes for a portion of his debt discharged the retiring partner from further liability for the debt. Maier *v.* Canavan, 8 Daly, 272. See, also, Thurber *v.* Corbin, 51 Barb. 216; Thurber *v.* Jenkins, 36 How. Pr. 66, *post*. p. 867.

Where a partnership liability for a debt is once fixed, the giving of a note in renewal by one partner alone, with the same sureties as on the original debt, who sign such renewal as sureties on the faith of representations that it is necessary in the business of the firm, and on the promise by him that his co-partner will also sign as a principal, does not, as against such sureties, operate as a payment of the original debt; and upon payment of such renewal note by the sureties, they may recover

timately the plaintiff sued all the three partners on the original bills, and he was held entitled so to do, never having discharged any of them, either intentionally or otherwise.

against the partners although such co-partner did not sign such renewal note. McKee *v.* Hamilton, 32 Ohio St. 7.

Prior and up to Sept. 23, 1850, the firm of Evans, Davis & Lownd, owed plaintiff $14,069.38, for money advanced to it, and for which he held their notes. That firm dissolved that day, and Evans and Davis formed a new firm with Dodge under the name of Davis, Evans & Dodge. Plaintiff gave up the notes of the old firm and took two new notes of $7,500, dated Sep. 23, 1850, payable "on demand after date," one of which was signed by Evans, and the other by Davis, of the firm of Evans, Davis & Lownd.

Plaintiff signed the partnership agreement of Davis, Evans & Dodge; that stated that the amount of $15,000, due to the plaintiff from the old firm, "is to remain in the new concern during the continuance of the co-partnership," he receiving interest at the rate of 7 per cent. per annum. Under the same date, Davis, Evans & Dodge and the plaintiff signed a paper stating they had received from plaintiff $15,000, "being the amount contributed by him as special partner to the concern of Davis, Evans & Dodge." Davis, Evans and plaintiff signed another paper of same date, stating that they had formed a limited partnership under the name of Davis, Evans & Dodge, the nature of its business, the residence of the partners, that plaintiff is the special partner, and as such has contributed $15,000 cash, and that Davis, Evans & Dodge were the general partners. Enough was not done to create a limited partnership. The new firm failed, and was dissolved within a year, and before this suit was brought, owing some $30,000 more than it could pay. This suit is upon the $7,500 note given by Davis to plaintiff when the new firm was formed. On that note and also on the other note for a like sum, given by Evans, there is endorsed, "This note is given as security to Levi Brown (the plaintiff,) for one-half of the $15,000 advanced to Davis, Evans & Dodge. Robert Davis:" *Held*, 1. The plaintiff never discharged Davis and Evans from liability for the amount the firm of Davis, Evans & Lownd owed him, but took the note of each for one-half that sum. 2. Though that sum was continued in the assets which represented it as a loan, to the firm of Davis, Evans & Dodge, it was not placed as between themselves at the risk of its business, nor lent on an agreement to look solely to the new firm for payment. 3. The note in suit became due on demand of payment made after the new firm had actually dissolved, and plaintiff could sue on the note witnout first having sued and exhausted his remedies by action against the new firm. 4. The evidence given is insufficient to establish an intent of Davis, Evans & Dodge and of the plaintiff, by an arrangement in respect to a limited partnership to defraud the public, or that they knew their acts were invalid, or that they were done with an improper motive. 5. The plaintiff is entitled to a judgment on the verdict. Permitting such a recovery will not withdraw from the legal or equitable process of the courts any property which should be appropriated to the creditors of the new firm, though held to be composed of Davis, Evans, Dodge and the plaintiff, as general partners. A judgment by such creditors against the four, and appropriate ulterior proceedings, will reach all the individual property of each as well as

Liability same in equity as at law.

Oakford v. European Ship Co.

Nor was there any difference in such cases as these between the liability of a retired partner at law and in equity. In Oakford *v.* European and American Steam Ship Company (*c*), a partner retired, and the continuing partners indemnified him against all claims that might be made against him as a member of the firm. Disputes afterwards arose between the continuing partners and a company respecting a contract entered into before the retirement. These disputes were *441 *partly adjusted. Those unadjusted were referred to arbitration pursuant to a clause in the contract. The reference was afterwards revoked; and an action upon the contract was then brought against the continuing partners and the retired partner. The retired partner sought to have this action restrained by injunction, upon the ground that his retirement and indemnity had placed him in the position of a surety only for the due performance of the

all the effects of the new firm. Brown *v.* Davis, 6 Duer, 549.

Where a partnership was dissolved and a new firm was formed, consisting in part of the same members, a creditor of the old firm with notice of the dissolution, taking in liquidation of his claim drafts of the old firm upon the new, accepted by the latter and drawn by a member of both, cannot, upon failure of the new firm, claim payment of the members of the old, unless he can show their assent to the making of the drafts. Patterson *v.* Camden, 25 Mo. 13.

Where a creditor of the former partnership drew on those persons who continued the social style of the late firm, for account of a balance due him by the former partnership, and his drafts were protested for non-payment, and paid by the drawer *supra protest*, a member of the former partnership, who is sued for such balance, cannot maintain that there was a novation of the debt; the drafts are to be held as having been drawn on his agents by his authority. Skannel *v.* Taylor, 12 La. Ann. 773.

A and B, being partners, purchased goods of C for the partnership, and gave each his separate note, with his separate surety, for a moiety of such goods. A afterwards went out of the concern, and B agreed to pay both notes. A's was therefore canceled, and B gave a new note, with the surety who was on his other note. Subsequently, B, failing to pay these debts, received the surety on his note into partnership in the business, and entered into articles of agreement with him, by which the surety was to receive all debts due to B and the former partnership, and all produce taken in discharge of debts; and the surety agreed to appropriate the same to the payment of the "debt originally contracted by A and B with" C: *Held:* that this applied to both the original notes and the note substituted for A's. Gordon *v.* Joslin, 4 Hayw. 115.

A drew a bill on B C & Co., which was accepted, and by him negotiated to a bank. At maturity the draft was paid by a like bill drawn on B alone, the firm in the mean time having been dissolved, which last bill A as indorser, was compelled to take up: *Held*, that he could not maintain an action against the firm to reimburse the amount thus paid. Springer *v.* Shirley, 11 Me. 204.

(*c*) 1 Hem. & M. 182.

contract; and that what had taken place since the retirement which was known to the company had discharged him. But it was held that his liability continued, and his bill was dismissed with costs.

The principle of the above cases applies to *dormant* partners even more strongly than to others; for a creditor who has a security of which he is unaware, cannot intentionally give up that security. Therefore, if A. and B. are partners, and the two become indebted to a creditor who knows only of A.; and then B., the dormant partner, retires, no dealings between the creditor and A. will discharge B. from his liability to be sued when discovered, unless those dealings extinguish the original debt not only as against B. but also as against A. (*d*) Position of dormant partners.

CLASS A *b*.—CASES IN WHICH A RETIRED PARTNER HAS NOT BEEN DISCHARGED, ALTHOUGH A NEW PARTNER HAS BEEN INTRODUCED INTO THE FIRM.

The introduction of a new partner has no effect on the liability of a retired partner, unless the liability of the former is substituted by the creditor for that of the latter, which cannot be the case unless the creditor can, as of right, hold the new partner liable for the old debt. This, moreover, he cannot do by virtue of any agreement between the partners themselves; and even if the new firm adopts the old debt and pays interest on it, this is *primâ facie* only in pursuance of some agreement between the partners themselves; and a creditor who does no more than allow the partners to carry out that agreement, does not debar himself of his right to look for payment to those originally indebted to him.[1] Effect of introduction of new partner on the liability of a retired partner.

(*d*) Robinson *v.* Wilkinson, 3 Price, 538.

[1] See *ante* 435, and note.

G. and S. were partners. G. retired from the firm, and S. thereupon formed a new co-partnership with E. S. then agreed with E. that all the property of the old firm should be transferred to the new, and that the new firm should assume and pay all of the debts of the old firm: *Held*, that it was a valid agreement, founded on a good consideration, and although not in writing, was not within the statute of frauds. Schindler *v.* Euell, 45 How. Pr. 38. See, also Hopkins *v.* Carr, 31 Ind. 260.

To a suit upon a promissory note made to the plaintiff by the defendants, J., one of them, severs and pleads that soon after making said note they dissolved partnership; that T., the other defendant, assumed the debts of the firm, gave his note to J. for the stock, with the plaintiff as his security for its pay-

*442 *A leading case on this head is Kirwan *v.* Kirwan. (*e*) There, three partners, C., M., and N., were indebted to the plaintiff. C. retired, and M. and N. continued in partnership together and agreed to discharge the debts of the old firm. M. afterwards retired, and N. took in a new partner. The plaintiff's account was transferred from the books of the old to the books of the new partnership, and interest was paid, and accounts were rendered to him as before. The plaintiff was informed of the dissolution, and had stated to one of the retired partners that he was aware he had no further claim upon him. But it was held, that the three original partners remained liable, as there was nothing to show that the security of the new firm had been substituted for that of the old, and the statement above referred to could not be regarded as an agreement to discharge the retired partner.

Kirwan v. Kirwan.

In Gough *v.* Davies (*f*), three persons were partners as bankers, and were indebted to the plaintiff. One of the partners retired; a new partnership was formed between the continuing partners and other persons; the plaintiff's debt was

Gough v. Davies.

ment, and that the plaintiff immediately after said dissolution became a partner with T., the other defendant, in similar business. On demurrer: *Held*, that the facts stated in the plea did not show a release from liability on the note, and that the plea was not good in bar of the action. Gulick *v.* Gulick, 16 N. J. L. 186.

If the plaintiff, having consigned goods for sale to the old partnership, is notified that a portion of his goods has been turned over to the new firm, and instructs them to sell the goods and remit the proceeds, this fact, unexplained, absolves the old firm from liability for this portion of the goods, but not for the residue. Hall *v.* Jones 56 Ala. 493.

The practice of the old firm "to make monthy reports or returns to persons consigning goods to them," does not legitimately tend to show notice to the plaintiff, a creditor of the old firm, of the changes in the partnership; but business letters, written to him by the new firm, are admissible evidence for that purpose. Hall *v.* Jones, 56 Ala. 493.

A firm consisting of two persons was dissolved, and a new firm organized, with the addition of J. The new firm gave a trust deed of property acquired partly with money contributed by J., to secure an indebtedness of both firms to a bank, with the understanding that J.'s interest should be applied to secure the indebtedness of the new firm: *Held*, that equity would enforce this intention for the benefit of the creditors of the new firm. Day *v.* Wetherby, 29 Wis. 363; Smith *v.* Peters, 20 How. Pr. 121.

Where a partnership was dissolved, and a new firm was formed, including, with one exception, the members of the former concern: *Held*, that as between the latter firm and the retiring partner, it would not be presumed that debts of the latter firm were contracted for payment of debts of the former one. Chaffin *v.* Chaffin, 2 Dev. & B. Eq. 255.

(*e*) 2 Cr. & M. 617.

(*f*) 4 Price, 200.

transferred to the books of the new firm, and he assented to such transfer. Moreover, the plaintiff continued to deposit money with the new firm, and was paid by it interest on the old debt and new deposits, as if they all formed one debt. But it was held, that there was nothing in all this to show any agreement by the plaintiff to discharge the retired partner, and he was consequently held liable for the old debt.

Blew *v.* Wyatt (*g*) is another case to the same effect. A clerk lent money to his employers, who were in partnership as brewers, and took an acknowledgment for it. Several changes took place in the firm, one of the original partners retiring and other persons from time to time coming in and going out. The clerk remained in the employ of the firm notwithstanding these changes, and was aware of them, and was always paid interest by the firm for the time being. He was nevertheless held entitled to sue the two original partners for the money he had lent them. Blew v. Wyatt.

Whether in these cases of Kirwan *v.* Kirwan, Gough *v.* *Davies, and Blew *v.* Wyatt, the creditor could have sued the new firm, may perhaps be open to doubt. (*h*) If he could not, it would be absurd to contend that the liability of the new firm was substituted for that of the old; whilst if he could, the evidence was not sufficient to show an intention on his part to deprive himself of the security afforded by the undoubted liability of the original firm before any change in it took place. It by no means follows that a creditor who assents to an arrangement by which a new person becomes liable to him, consents to abandon his hold on another person clearly liable to him already; and unless a substitution of liability can be established, the old liability remains. (*i*) *443

Right to sue new firm not inconsistent with right to sue the old firm.

CLASS B.—CASES IN WHICH A RETIRED PARTNER HAS BEEN DISCHARGED.

In all these cases it will be found that the Court or a jury has come to the conclusion that the creditor has in fact, either expressly or impliedly from his course of dealing with the continuing part-

(*g*) 5 Car. & P. 397.

(*h*) See *per* Bolland, B., 2 Cr. & M. 628; Daniel *v.* Cross, 3 Ves. 277; Ferguson *v.* Fyffe, 8 Cl. & Fin. 121.

(*i*) See Harris *v.* Farwell, 15 Beav. 31.

ners, adopted them as his sole debtors, and thereby in fact discharged the retired partner.

Retired partner may be discharged though no new partner comes in.

That a retired partner *may* be discharged by the creditor's adoption of the other partners as his sole debtors, although no new partner has been introduced into the firm, is clear from the case of Thompson *v.* Percival (*k*) already noticed.

Evans *v.* Drummond.

In Evans *v.* Drummond (*l*), a firm of two partners gave a partnership bill for goods supplied them. One of the partners retired, and the bill when due was not paid, but was renewed by another bill given by the partner who continued the business. The creditor took this bill knowing of the change in the firm. Lord Kenyon held, that by so doing the creditor had relied on the sole security of the continuing partner, and had discharged the other. Reed *v.* White (*m*) is a similar case and to the same effect.

*444 *The inference that a retired partner has been discharged is greatly facilitated by the circumstance that a new partner has joined the firm and become liable to the creditor in respect of the debt in question. (*n*) But this is not necessarily conclusive; for there may be circumstances showing that such was not the intention of the parties. (*o*) At the same time, in the absence of any such evidence, the acceptance by the creditor of the liability of a new partner will practically preclude him from afterwards having recourse to the retired partner. (*p*)

Effect of introduction of new partner.

Hart *v.* Alexander.

In Hart *v.* Alexander (*q*), the plaintiff, an officer in the East India Company's service, had in 1813 opened an account with the house of Alexander and Co. of Calcutta, which failed in 1832. The defendant retired from the firm in 1822, when a new partner was introduced, and since that time other changes had taken place, some of the old partners retiring and new ones coming in. The defendant's retirement was

(*k*) 5 B. & Ad. 925, *ante*, p. 438.

(*l*) 4 Esp. 89. Compare Bedford *v.* Deakin; 2 B. & A. 210, noticed *ante*, p. 440.

(*m*) 5 Esp. 122.

(*n*) See as to this, *ante*, p. 389, *et seq.*

(*o*) See *infra*, p. 450, and Keay *v.* Fenwick, 1 C. P. D. 745.

(*p*) As to the effect of taking a new security when no new partner comes in, see *ante*, p. 440.

(*q*) 7 C. & P. 746, and 2 M. & W. 484. See, also, Wilson *v.* Lloyd, 16 Eq. 60; Oakley *v.* Pasheller, 4 Cl. & Fin. 207, noticed *infra*, p. 447. Compare Commercial Bank Corp. of India and the East, 16 W. R. 958, and *Ex parte* Gibson, 4 Ch. 662.

advertised, and there was evidence to show that the plaintiff was aware of the fact. The new firms from time to time accounted with the plaintiff and paid him interest, sometimes at one rate and sometimes at another. On the bankruptcy of the firm in 1832, the plaintiff proved the amount of his debt against its joint estate. The plaintiff afterwards sued the defendant; and the case was tried before Lord Abinger, who is reported to have said to the jury:—

"To ask you if there was an agreement by the plaintiff to discharge the defendant, is to put the case upon a false issue, the agreement, if any, being an agreement raised by construction of law: the true question being whether the plaintiff did not go on dealing with the new firm, and making up fresh accounts with them, so as to discharge the defendant. I take the law to be this: where a debtor is a partner in a firm, leaves that firm, and any person trading with the firm has notice of it, and he goes on dealing with the firm and making fresh contracts, that discharges the retiring partner, though no new partner comes in. So it is if the creditor applies for part of his balance and sends in more goods; so, if the creditor strikes *a fresh balance with the new partners for a different rate of interest; so, *445 if a new partner comes in and the creditor accepts an account in which the new partner is made liable for the balance, that discharges the old firm, as both firms cannot be liable at once for the same debt. This is the law as laid down in several cases in which indeed there is some contradiction: however, what I have stated is the result of them." (*r*)

The jury found for the defendant. A new trial was moved for on the ground that there was no evidence to go to the jury to show that the plaintiff had agreed to discharge the defendant from his liability, but the Court (*s*) thought that there was abundant evidence to show that the plaintiff knew of the defendant's retirement, and a new trial was refused.

To this class of cases also belong those already noticed, in which the joint liability of old and new partners has been substituted for that of the old partners only. (*t*)

A partner who has retired may also be discharged by the conduct of the creditor, if he has been party or privy to any fraud in consequence of which the retired partner has acted on the supposition that the claims of the creditor were satisfied by the continuing partners. (*u*)

Fraud on retired partner.

(*r*) The learned judge was scarcely warranted by those cases in going so far as he did.

(*s*) Bolland, B., *dissentiente*.

(*t*) *Ex parte* Whitmore, 3 Deac. 365; Rolfe *v.* Flower, L. R. 1 P. C. 27, noticed *ante*, pp. 392, 393.

(*u*) See Featherstone *v.* Hunt, 1 B. & C. 113, where, however, the fraud was not made out.

Discharge of estate of deceased partner.

Closely allied to the subject which has just been discussed, is that which relates to the discharge of the estate of a deceased partner from the liabilities to which he was subject as a partner at the time of his death. The position of the estate of a deceased partner, with reference to the question of discharge by reason of a creditor's dealings with the surviving partners, is very similar to the position of a retired partner. The same principles are applicable to both, and the authorities which are in point as regards the one, are so also as regards the other. The parallel between the two would be complete, were it not that before the Judicature acts the estate of a partner who died in the lifetime of his co-partners was liable for the joint debts of the firm in equity only; and there might have been circumstances to induce a Court of equity to hold that estate discharged, although the same circumstances would *not in the case of a retiring partner, have operated as a discharge at law, (*x*) *vice versa*. (*y*)

*446

It has been decided in equity that if a creditor of a firm knows of the death of one of the firm and continues to deal as before with the survivors, he does not lose the remedy which he had against the estate of the deceased partner, unless there is evidence showing an intention to abandon the right of having recourse thereto for payment (*z*); and an attempt by the creditor to obtain payment from the survivors is not sufficient evidence of such an intention. Thus, if he sues the survivors, and obtains judgment against them, this will not necessarily deprive him of his right to obtain payment out of the estate of the deceased. (*a*) So, proving in bankruptcy against the estate of the new firm, is not, *per se*, sufficient to preclude the creditor from afterwards having recourse to the assets of the dead partner. (*b*) Still less will any dealing with the surviving partner if induced by his fraud. (*c*)

(*x*) See *Ex parte* Kendall, 17 Ves. 522 and 525.

(*y*) Jacomb *v.* Harwood, 2 Ves. S. 265.

(*z*) Winter *v.* Innes, 4 M. & Cr. 101, and see Devaynes *v.* Noble, Sleech's case, 1 Mer. 539; Clayton's case, ib. 579; Palmer's case, ib. 623; Braithwaite *v.* Britain, 1 Keen. 206.

(*a*) Jacomb *v.* Harwood, 2 Ves. S. 265, and *ante*, p. 370.

(*b*) Sleech's case, 1 Mer. 570; Harris *v.* Farwell, 15 Beav. 31. But compare Brown *v.* Gordon, 16 Beav. 302, and Bilborough *v.* Holmes, 5 Ch. D. 255, *infra*, note (*e*).

(*c*) As in Plumer *v.* Gregory, 18 Eq. 621.

Even where a new partner has been introduced, a creditor of the old firm, who continues to deal with the new firm as he dealt with the old, and is paid interest by the new firm as if the debt was its own, does not thereby deprive himself of his right to be paid out of the estate of a deceased member of the old firm. (*d*) In Harris *v.* Farwell (*e*), a banking firm consisting of three partners became indebted to a customer on a deposit note; one of them died, and the survivors took his son into partnership with them.

Liability not discharged by dealing with new persons

Harris v. Farwell.

The new partnership *paid interest on the note for some time, and then became bankrupt. The plaintiff proved against the new firm for the amount of his debt, and was paid a dividend out of its estate. It was held that he had done nothing which precluded him from having recourse to the estate of the deceased partner. *447

On the other hand, if, after the death of a partner, a creditor of the old firm knows of the death, and does not take any steps to obtain payment from the estate of the deceased, if the creditor lies by and allows that estate to be administered as if he had no claim upon it, and if he continues to deal with the surviving partners as if they and they alone were his debtors, in that case the creditor will not be allowed to resort to the assets of the deceased.[1] Oakley *v.* Pasheller and Brown *v.* Gordon may be referred to as illustrating this doctrine.

Effect of administering the estate.

In Oakley *v.* Pasheller (*f*) two partners, A. and B. executed three joint and several bonds to the plaintiff to secure repayment of money lent. A. died, and B. took in C. as a partner with him. An agreement was come to between A.'s executors and B. and C., that the latter should take the assets and liabilities of the old firm, and indemnify A.'s estate from those lia-

Oakley v. Pasheller.

(*d*) Daniel *v.* Cross, 3 Ves. 277.

(*e*) 15 Beav. 31. It does not appear from the report when the customer first knew of the change in the firm. Compare Bilborough *v.* Holmes, 5 Ch. D. 255, a somewhat similar case, where the estate of the deceased partner was held to be discharged. The proof, however, there, was for money lent to the new firm.

[1] A partnership creditor, after the death of one partner, may continue to deal with the survivor, and receive partial payments from him without prejudice to his right to resort to the assets of the deceased partner; and he does not lose this right by delay in calling upon the survivor for payment. Hamersley *v.* Lambert, 2 Johns. Ch. 508.

See *ante*, 440, note.

(*f*) 10 Bli. N. S. 548, and 4 Cl. & Fin. 207. See on it 1 Q. B. D. 543. In Wilson *v.* Lloyd, 16 Eq. 60, this case was followed, though no new partner

bilities. Of this the plaintiff had notice. (*g*) He was paid interest on his bond by the new firm, and received accounts from it in which the old debt and the debts contracted by the new firm were blended together. On two occasions the plaintiff had agreed to give, and had given, the new firm considerable further time to pay the bonds, but A.'s executors had no notice of this. Ultimately the plaintiff took from B and C. an assignment of some policies as a collateral security for payment of the bonds, expressly reserving his rights against A.'s estate. It was, however, held that A.'s estate had been discharged from its liability from what had previously taken place. The Court thought that A.'s estate had become, as it were, surety only for payment of the debt, and that *448 it had *been discharged by the long indulgence granted by the plaintiff to the other debtors. (*h*)[1] The true *ratio decidendi*, however, was that the plaintiff had accepted B. and C. as his sole debtors.

joined the firm, but Wilson *v.* Lloyd cannot be relied upon. See Simpson *v.* Henning, L. R. 10 Q. B. 406.

(*g*) See 4 Cl. & Fin. 212, the marginal note states that he had not.

(*h*) This quasi suretyship is surely a false analogy, unless the creditor has assented to such a change in his debtor's position. See, on this point, Oakford *v.* European, &c., Ship Co. 1 Hem. & M. 182, *ante*, p. 440; Swire *v.* Redman, 1 Q. B. D. 537. See, also, Rodgers *v.* Maw, 4 Dowl. & L. 66.

[1] Where a creditor of a partnership, after dissolution thereof, knowing that one or several of the co-partners have agreed with the others to assume and pay the debts of the firm, takes the negotiable notes of those who should pay in payment of his debt, and thus extends the time of payment, he thereby discharges the other partners. Millerd *v.* Thorn, 56 N. Y. 402; Stone *v.* Chamberlain, 20 Ga. 259; Dodd *v.* Dreyfus, *infra;* Hoopes *v.* McCan, 19 La. Ann. 201.

The dissolution of the partnership, and the retirement of one partner, together with the assumption by the other partners of the debts of the old firm, constitutes such retiring partner merely a surety for the payment of such debts and the extension of the time for the payment of such debts, made by creditors with a knowledge of all the circumstances, and without the consent of the retired partner, has the effect of discharging him from liability therefor. Dodd *v.* Dreyfus, 57 How. Pr. 319; S. C. 17 Hun, 600. See, also, Ætna Ins. Co. *v.* Peck, 28 Vt. 93.

Where such a debt is a note, and the payee has received from the new firm a chattel mortgage of the partnership property, sufficient, if applied, to satisfy the debt, he may, with the assent of the retiring partners, release the mortgage, and return the property or its avails to the new firm, without impairing his rights against all the joint obligors on the note, even though he had such notice of the subsequent contract between the partners. Rawson *v.* Taylor, 30 Ohio St. 389.

A partner, to whom a note due the firm was assigned by the other partner, on a dissolution of the partnership, subsequently took a new note of the debtor

In Brown *v.* Gordon (*i*), the plaintiff deposited money with a banking firm consisting of three partners, A., B., and C. D. afterwards became a partner. A. died, having made a will containing a trust for payment of his debts. After A.'s death his son, who was also his executor and residuary devisee and legatee, became a partner in the bank. Some time afterwards B. and C. died. The bank had been continued, first, by B., C., D., and A.'s son; then by D., C., and A.'s son, and lastly by D. and A.'s son; but it ultimately stopped payment, and the two surviving partners were adjudged bankrupts. Interest had been paid to the plaintiff by the successive firms, and the plaintiff's debt was proved in the Bankruptcy Court. On a bill filed for the purpose of obtaining payment out of A.'s estate, it was held that the plaintiff, by neglecting for sixteen years to make any claim against the assets of the deceased, and by treating the successive firms as his debtors, had discharged the estate of the deceased, and that he could not be considered as a creditor of the deceased, so as to avail himself of the trust in the will for payment of debts. Grown *v.* Bordon.

In whatever way a creditor may have dealt with the surviving partners, he cannot be held to have adopted them as his sole debtors in respect of a demand arising out of a fraudulent transaction, of which he has been constantly kept in ignorance. (*k*) Cases of fraud.

Before leaving this subject, it may be useful shortly to review the effect of the numerous cases which have been noticed in the preceding pages. Those cases established that:— Recapitulation.

1. An express agreement by the creditor to discharge a retired partner, and to look only to a continuing partner, is *not inoperative for want of consideration; for Lodge *v.* Dicas (*l*) has, as to this point, been overruled by Thompson *v.* Percival (*m*);[1] *449

payable in twelve months: *Held*, that the other partner was thereby discharged from all liability as surety for the payment of the note. Wilde *v.* Jenkins, 4 Paige, 481.

(*i*) 16 Beav. 302; Bilborough *v.* Holmes, 5 Ch. D. 254, a similar case, but not so strong. See *ante*, note (*e*).

(*k*) See Clayton's case, 1 Mer. 579; *ante*, pp. 431, 432.

(*l*) 3 B. & A. 611.

(*m*) 5 B. & Ad. 925.

[1] Where M. and B., co-partners, ordered a certain piece of work of C: *Held*, that an agreement made between C. and M. after the dissolution of the co-partnership, that M. should be released from his liability for the work already performed, was void for want of consideration, B. not having prom-

2. An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him of his rights against the old firm either at law (*n*) or in equity (*o*);

3. And it will certainly not do so if, by expressly reserving his rights against the old firm, he shows that by adopting the new firm he did not intend to discharge the old firm (*p*);

4. And by adopting a new firm as his debtor, a creditor cannot be regarded as having intentionally discharged a person who was a member of the old firm, but was not known to the creditor so to be (*q*);

5. But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment (*r*);

6. And a creditor who assents to a transfer of his debt from an old firm to a new firm, and goes on dealing with the latter for many years, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the old firm. If a jury finds that he has done so, the Court will not disturb the verdict (*s*);

ised to assume the liability. Otherwise, had B. so promised, one debt being substituted for the other. Collyer *v.* Moulton, 9 R. I. 90.

The affairs of a partnership were submitted to an arbitrator, who was to designate which partner should assume certain debts, and also to divide and dispose of the firm assets; to which submission a creditor assented, and agreed to be bound by the award, which was that one party should take the assets and pay all the debts: *Held*, that the surrender by the other partner of his interest in the assets, and the consent of the creditor to the submission, was a consideration for his promise, and that the co-partner was released thereby from the claim. Backus *v.* Fobes, 20 N. Y. 204.

Where, upon the dissolution of a copartnership, one partner assumes a liability, he does it *primâ facie*, upon sufficient consideration, leaving his copartners liable only as sureties; and they may take measures to have the claim assigned and collected from the partner liable. Ætna Ins. Co. *v.* Peck, 28 Vt. 93.

(*n*) David *v.* Ellice, 5 B. & C. 196; Thompson *v.* Percival, S. B. & Ad. 925. Heath *v.* Percival, 1 P. W. 682, and 1 Str. 403; Kirwan *v.* Kirwan, 2 Cr. & M. 617; Gough *v.* Davies, 4 Price, 200; Blew *v.* Wyatt, 5 C. & P. 397.

(*o*) Oakford *v.* European, &c., Ship Co., 1 Hem. & M. 182; Sleech's case, 1 Mer. 539; Clayton's case, ib. 579; Palmer's case, ib. 623; Braithwaite *v.* Britain, 1 Keen, 206; Winter *v.* Innes, 4 M. & Cr. 101.

(*p*) Bedford *v.* Deakin, 2 B. & A. 210; Jacomb *v.* Harwood, 2 Ves. S. 265.

(*q*) Robinson *v.* Wilkinson, 3 Price, 538.

(*r*) Evans *v.* Drummond, 4 Esp. 89; Reed *v.* White, 5 ib. 122.

(*s*) Hart *v.* Alexander, 2 M. & W. 484.

and if the question arises before a Judge, *e.g.*, in bankruptcy or in the administration of the estate of a deceased partner, the Court will consider all the circumstances of the case, and will infer a discharge if, upon the whole, justice to all parties so requires (*t*)

But the small *number of cases in which relief has been refused, compared with those in which it has been granted, shows that the leaning of the Court is strongly in favor of the creditor. *450

The further illustration of these principles and their application to companies which amalgamate with others will be noticed hereafter.

(b) Of the doctrine of merger.

Merger of one security in another.

Having now examined the mode in which a partner may be discharged from liability, by reason of a substitution of some other person in his place with the creditor's assent, it is necessary to advert to a doctrine by which a partner occasionally finds himself discharged, simply because his creditor has obtained a security of a higher nature than that which he previously possessed.

Bills, &c., create no merger.

If a person solely indebted enters into partnership with another, and the two give a joint note or bill for the debt of the first, and the note or bill is not paid, the creditor is not precluded from demanding payment from his original debtor (*u*), unless it can be shown that the bill or note was taken in satisfaction of the original demand. (*v*)[1] So, if two partners are indebted

(*t*) *Ex parte* Kendall, 17 Ves. 522–5; Oakley *v.* Pasheller, 4 Cl. & Fin. 207; Wilson *v.* Lloyd, 16 Eq. 60; Brown *v.* Gordon, 16 Beav. 302.

(*u*) *Ex parte* Seddon, 2 Cox, 49; *Ex parte* Lobb, 7 Ves. 592; *Ex parte* Meinertzhagen, 3 Deac. 101; *Ex parte* Hay, 15 Ves. 4; *Ex parte* Kedie, 2 D. & C. 321.

(*v*) As in *Ex parte* Whitmore, 3 Deac. 365; *Ex parte* Kirby, Buck, 511; *Ex parte* Jackson, 2 M. D. & D. 146.

[1] See *ante*, 550, note.

The joint and several note of a partnership is not extinguished by a transfer thereof to another firm composed in part of the same persons; and the latter firm may negotiate the note to third persons. Fulton *v.* Williams, 11 Cush. 108.

There being two outstanding mortgages of certain lands, X. and Y., partners, bought with partnership funds one-half of the senior mortgage interest, and the entire legal interest in the land, taking the former in the name of X. and the latter in the name of Y. In a contest between the holders of the first mortgage and junior mortgagee, *held*,

on the partnership account, and one of them gives a bill or note for the debt, and that bill or note is dishonored, the creditor who took it will not be precluded from having recourse to both partners for payment (*x*), unless it can be shown that he intended to substitute the liability of the one for the joint liability of the two. (*y*)[2]

But when a creditor obtains from his debtor a security of a higher nature than he had before and does not take care to *accept it as collateral security, (*z*), the original debt is merged in the higher security, and can no longer be made the foundation of an action, or of proof in bankruptcy (*a*); and this doctrine is as much applicable to joint as to several obligations. And there is no mean authority for saying that if two parties are jointly indebted by simple contract, and one of them gives his bond for payment of the debt, the joint debt is at an end (*b*); but there are recent decisions to the

Securities of a higher nature do.

*451

that there was no merger of the legal and equitable estates so purchased; there being an intervening estate by the second mortgage, the taking of the purchased estates in different names showing an intention to keep them distinct; and the transaction not being injurious to the junior mortgagee. Scott *v.* Webster, 44 Wis. 185.

(*x*) Keay *v.* Fenwick, 1 C. P. D. 745; Bottomley *v.* Nuttall, 5 C. B. N. S. 122; Whitwell *v.* Perrin, 4 C. B. N. S. 412; *Ex parte* Hodgkinson, 19 Ves. 201. See, too, *Ex parte* Raleigh, 3 M. & A. 670; Bedford *v.* Deakin, 2 B. & A. 210, noticed *ante*, p. 440.

(*y*) As the jury found was the case in Evans *v.* Drummond, 4 Esp. 89, and Reed *v.* White, 5 ib. 122. Compare the cases in the last note.

[2] See Melane *v.* Spencer, 6 Ired. L. 423; Wilson *v.* Jennings, 4 Dev. L. 90. See *ante*, 450, note.

Although the acceptance of a security of a higher dignity merges and extinguishes the original cause of action; yet if one partner, who has executed in the name of the firm a single bill for the amount of a debt which the firm owes, afterwards gives a promissory note in the name of the firm, a recovery may be had thereon against the firm. The partnership debt, which was extinguished by the acceptance of the single bill, is thereby revived. Davidson *v.* Kelly, 1 Md. 492.

Where a creditor of a former commercial firm sues its individual members for goods sold to the firm, and declares in his petition on the itemized account of the goods, and also on a promissory note of the firm given in liquidation of the account by one not authorized to sign for the firm, he will be entitled to recover for the goods on the unopposed proof of their sale and delivery. Dodd *v.* Bishop, 30 La. An. 1178.

(*z*) As in *Ex parte* Hughes, 4 Ch. D. 34, note.

(*a*) *Ex parte* Oriental Financial Corporation, 4 Ch. D. 33; Higgen's case, 6 Co. 44 b; Owen *v.* Homan, 3 Mc. & G. 378; Price *v.* Moulton, 10 C. B. 561; Shack *v.* Anthony, 1 M. & S. 572.

(*b*) Basset *v.* Wood, 11 Vin. Ab. Exting. B. 8; and see Owen *v.* Homan, 3 Mc. & G. 407; *Ex parte* Hernaman, 12 Jur. 642.

contrary (*c*),[1] and the question cannot be considered as yet settled. However, it seems that if the creditor obtains judgment against one of the partners only, he loses his remedy against the others (*d*);[2] except when they are abroad, and cannot therefore be sued

(*c*) Sharpe *v.* Gibbs, 16 C. B. N. S. 527: Ansell *v.* Baker, 15 Q. B. 20, and *infra*, note (*k*).

[1] The sealed individual note of an ostensible partner does not extinguish the original cause of action as against a dormant partner, whose connection as partner was unknown to the creditor at the time the note was executed. Chamberlain *v.* Madden, 7 Rich. 395. See, also Watson *v.* Owens, 1 id. 111.

Contra, Ward *v.* Motter, 2 Rob. (Va.) 536. See, also, Anderson *v.* Levan, 1 Watts and Serg. 334.

The execution of a sealed note for a debt due by partners, by one of them, in the firm name, without authority, does not merge the joint liability on the simple contract. Brozee *v.* Poyntz, 3 B. Mon. 178; Calk *v.* Orear, 2 id. 420; Horton *v.* Child, 4 Dev. L. 460.

So, a promissory note given by a firm is not merged in a bond and mortgage, executed at the same time and for the same debt, by one partner in the name of the firm, but without the knowledge of his co-partners. Pierce *v.* Cameron, 7 Rich. 114.

The mere acceptance of a bond and a deed of trust to secure it by a creditor from one member of the firm after dissolution, for a partnership debt due by simple contract, destroys the right of the creditor to proceed at law against the other member; but a court of equity will look at the attendant circumstances of the case, and will not absolve the firm from liability unless it appears from those circumstances, or otherwise, that the higher security was accepted as a substitute for the simple contract of the firm. Niday *v.* Harvey, 9 Gratt. 454.

A partnership assigned the partnership effects for the benefit of such creditors as should sign the deed of assignment, and receive their dividends; and, in consideration thereof, and that they would release the other partners, the senior partner covenanted to pay the balance due such creditors after exhausting the property assigned: *Held*, that the prior claims of the creditors who became parties to the agreement were extinguished, and merged in the covenant of the senior partner. Hosack *v.* Rogers, 8 Paige, 229.

(*d*) King *v.* Hoare, 13 M. & W. 494; *Ex parte* Higgins, 3 DeG. & J. 33. A colonial judgment creates no merger, Bank of Australasia *v.* Nias, 16 Q. B. 717.

[2] When a judgment is obtained against one of two partners on a joint, the contract is merged in the judgment; and an action at law cannot be maintained thereon against the partners. Sedan *v.* Williams, 4 McLean, 51; Smith *v.* Black, 9 Serg. & R. 142. *Contra*, Williams *v.* Rogers, 14 Bush, 777.

The ostensible partner of a firm gave notes in the partnership name, which was his own name, for goods purchased for the use of the partnership, upon which the payee, in ignorance of the partnership, sued and recovered judgment against the ostensible partner alone: *Held*, in an action afterwards brought against the dormant partner, that his liability upon the notes was extinguished by the judgment. Moale *v.* Hollins, 11 Gill & J. 11. See, also Smith *v.* Black, *supra*.

A bill against dormant partners, after judgment recovered against the os-

here with effect. (*e*) But if one partner only is sued, and judgment is given for him, the creditor is not precluded from afterwards suing the others, unless the first action failed for a reason which applies equally to the second. (*f*)

Merger of joint and several obligations.

With respect to obligations which are joint as well as several, there is more difficulty. A joint and several obligation, arising *ex delicto*, is extinguished by a judgment recovered against any one of the persons obliged (*g*); but, as regards joint and several obligations arising *ex contractu*, although a joint judgment against all the persons obliged extinguishes the separate

tensible partners, cannot be sustained, without showing special cause for relief; as that the plaintiff was kept in ignorance of the partnership by undue means; that he has used due diligence to inform himself, etc. Penny *v.* Martin, 4 Johns. Ch. 566.

Where one of several partners unites with a third person in making a note to a creditor of the firm, for a partnership debt, which, by agreement, is made and accepted, not for the debt but a collateral security, merely, a judgment upon the note will not merge or affect the original indebtedness, even as to the partner signing the note. In such a case, the agreement prevents the merger. Hawks *v.* Hinchcliff, 17 Barb. 492.

Judgment against one partner upon a contract, upon its face his sole and individual contract, is no bar to a subsequent action upon it as a partnership contract. Scott *v.* Colmesnil, 7 J. J. Marsh. 416.

Where a State statute provides that in suits against two or more jointly indebted, the judgment shall be evidence, as against those not served with process, only of the extent of the plaintiff's demand, the original demand against the parties not brought into court is not merged in the judgment against those who were. Mason *v.* Eldred, 6 Wall. 231.

The fact that a judgment was rendered against part of the members of a firm does not affect the equitable right to have the partnership property subjected to its payment. Equity does not regard the form of the judgment, but the substance of the debt. Martin *v.* Davis, 21 Iowa, 535.

Where a partnership exists between two persons, one of whom is a dormant partner, and the creditors of the firm have obtained judgments against the ostensible partner, founded on debts created on the partnership account, upon which executions have been issued and returned *nulla bona*, a bill in equity against both partners will be sustained, upon the allegation that the dormant partner has by fraudulent connivance with the ostensible one, obtained the possession of and laid claim to all the partnership assets, in fraud of the creditors; the relief which equity will give is to subject the whole assets to the payment of such debts. How *v.* Kane, 2 Chand. 222.

(*e*) See 19 & 20 Vict. c. 97, § 11; *Ex parte* Waterfall, 4 De G. & S. 199

(*f*) Phillips *v.* Ward, 2 Hurlst. & C. 717.

(*g*) Brinsmead *v.* Harrison, L. R. 6 C. P. 584, aff. 7 ib. 547; Brown *v.* Wootton, Cro. Jac. 73; Buckland *v.* Johnson, 15 C. B. 145; and see, as to the plea of another suit depending, Boyce *v.* Douglas, 1 Camp. 61.

liability of each, for *nemo debet bis vexari, pro eadem causâ*, yet a judgment obtained against one of them only does not extinguish the separate liability of the others. (h)[3] *In order that this effect may be produced the judgment must be satisfied. (*i*)[1] *452

Further, if several persons are jointly liable, and one of them afterwards gives a separate simple contract security on which judgment is recovered against him, this will not merge the prior joint liability. (*k*)

Effect of doctrines of merger on securities for future advances.

The rule that a bond or judgment merges any simple contract debt in respect of which it may have been given or obtained, only applies if the simple contract debt existed first in order of time, and if the specialty creditor is the same as the simple contract creditor. So that if a bond is given or a judgment is obtained (under a warrant of attorney) as a security for *future* advances (*l*); or if a simple contract debtor gives a bond or confesses a judgment to a trustee for his creditor (*m*), in neither of these cases will there be any merger.

Estates of deceased partners.

It must also be borne in mind that as regards the liability of the estate of a deceased partner, if a joint bond is given for a pre-existing joint and several debt, the bond will itself be treated as joint and several (*n*); and a judgment recovered against the surviving members of a firm does not preclude the judgment creditor from obtaining payment of his original debt from the estate of the deceased partner. (*o*)

(*h*) *Ex parte* Christie, Mon. & Bl. 352.

[3] A judgment recovered in Missouri, where by the law all contracts are construed as joint and several, against one of three co-partners who had drawn bills upon the plaintiffs, which were accepted in this State, and paid for accommodation without funds, is not a merger of the right of action against the other partners in this State. Reed *v.* Girty, 6 Bosw. 567.

(*i*) Higgen's case, 6 Co. 46 a; King *v.* Hoare, 13 M. & W. 494; and see Drake *v.* Mitchell, 3 East, 251.

[1] And such is believed to be the better opinion also in respect to joint and several obligations arising *ex delicto* Cooley on Torts, 136–139.

(*k*) Drake *v.* Mitchell, 3 East, 251. See, too, Ansell *v.* Baker, 15 Q. B. 20; *Re* Clarkes, 2. Jo. & Lat. 212; *Ex parte* Bate, 3 Deac. 358, where a joint and several debt was held not merged, so far as it was joint, by higher separate securities.

(*l*) Holmes *v.* Bell, 3 Man. & Gr. 213, and the note there.

(*m*) Bell *v.* Banks, 3 Man. & Gr. 258. In such a case equity would probably follow the law, *ut res magis valeat quam pereat.*

(*n*) See *ante*, p. 370; Bishop *v.* Church, 2 Ves. S. 100 and 371; Simpson *v.* Vaughan, 2 Atk. 31.

(*o*) Jacomb *v.* Harwood, 2 Ves. S.

Merger not an extinct on of the debt.

Further, it is to be observed that merger does not, properly speaking, extinguish a debt; for, notwithstanding the fact that a debt is merged in a higher security, the merged debt is sufficient to support an adjudication of bankruptcy against the debtor. (*p*)

*453 *Again, proof in bankruptcy against the estate of one partner in respect of a partnership debt does not preclude the proving creditor from afterwards suing the solvent partners, and recovering from them what he may have failed to obtain in the bankruptcy. (*q*)

Proof in bankruptcy.

4. *Lapse of Time.*

Statutes of Limitation.

By a number of well-known enactments, usually referred to as the Statutes of Limitation, a certain definite time has been prescribed, within which, if at all, a person having a demand against another must enforce it. These statutes apply as well to partners as to other persons, and it becomes, therefore, necessary to advert to them in the present work.

The principal statutes are the following (*r*):—21 Jac. 1, c. 16; 4 & 5 Anne, c. 16: 3 & 4 Wm. 4, c. 27; 3 & 4 Wm. 4, c. 42; 19 & 20 Vict. c. 97.

Times limited for bringing actions, &c.

Neglecting those provisions of the Statutes of Limitation, which are of little importance to partners, the times prescribed for the prosecution of actions and suits are as follows:—

Twenty years.

Twenty years (*s*) for the recovery of legacies, of rent, of money charged on lands, of money due on judgments, bonds, and mortgages, and for the redemption of mortgages (3 & 4 Wm. 4, c. 27, §§ 28 and 40; 3 & 4 Wm. 4, c. 42.)

Six years.

Six years for the recovery of arrears of rent, and of interest on money charged on land (3 & 4 Wm. 4, c. 27, §§ 41, 42); and for the recovery of seamen's wages (4 & 5 Anne,

265; Liverpool Borough Bank *v.* Walker, 4 DeG. & J. 24. See, also, Rawlins *v.* Wickham, 3 De G. & J. 304.

(*p*) *Re* Griffiths, 3 De G. M. & 174, and the cases there cited.

(*q*) Keay *v.* Fenwick, L. R. 1 C. P. D. 745; Whitwell *v.* Perrin, 4 C. B. N. S. 412; Bottomley *v.* Nuttall, 5 C. B. N. S. 122.

(*r*) The statutes relating to shareholders in companies are noticed *post*, p. 462. The principal act relating to Ireland is 16 &17 Vict. c. 113. See § 26.

(*s*) Twelve years after 1st Jan. 1879. See 37 & 38 Vict. c. 57.

c. 16, § 17); and of money due on bills of exchange, promissory notes, or in respect of any other contract which is not under seal (21 Jac. 1, c. 16, § 3); and of money due on awards where the submission is not under seal (3 & 4 Wm. 4, c. 42, § 3); and for the institution of actions or suits for an account (21 Jac. 1, c. 16, § 3, and 19 & 20 Vict. c. 97, § 9).

Four years for the recovery of damages in respect of an assault, battery, or false imprisonment (21 Jac. 1, c. 16, § 3). Four years.

**Two years* for the recovery of damages for words of *454 themselves defamatory (21 Jac. 1, c. 16, § 3); and for the recovery of penalties, damages, or sums given by statute to the party grieved (3 & 4 Wm. 4, c. 42). Two years.

There are provisions extending these periods in favor of persons who, when their right to sue accrues, are within the age of twenty-one, under the disability of coverture, or of unsound mind (*t*); and also in favor of those whose demands are against persons beyond the seas. (*u*) But the absence beyond the seas of one of several joint debtors does not now, as it did formerly, enlarge the time for suing the others. (*v*) Further time.

By the statute of James, actions "for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants," were excepted from limitation, but this exception no longer exists (*x*); and actions for an account, or for not accounting, must be brought within six years. (*y*) Account between merchants.

In applying the Statutes of Limitation to any particular case, it is important to bear in mind one or two principles applicable to them all. General rules applicable to the Statutes of Limitation.

(*t*) 21 Jac. 1, c. 16, § 7; 3 & 4 Wm. 4, c. 42, § 4; 3 & 4 Wm. 4, c. 27, § 16, &c. The imprisonment or absence beyond the seas of a creditor does not now enlarge his time for suing, 19 and 20 Vict. c. 97, § 10, Cornill *v.* Hudson, 8 E. & B. 429; Pardo *v.* Bingham, 4 Ch. 735. The absence beyond the seas of one of several joint creditors did not enlarge their time for suing under the old law. Perry *v.* Jackson, 4 T. R. 516.

(*u*) 4 & 5 Anne, c. 16, §19, and 3 & 4 Wm. 4, c. 42, § 4.

(*v*) 19 and 20 Vict. c. 97, § 11. See, as to what is beyond the seas, § 12, and as to the old law, Fannin *v.* Anderson, 7 Q. B. 811; Towns *v.* Mead, 16 C. B. 123.

(*x*) 19 & 20 Vict. c. 97, § 9.

(*y*) See 19 & 20 Vict. c. 97, § 9, and 21 Jac. 1 c. 16, § 3. This branch of the subject will be examined more at length in that part of the work which treats of accounts between partners. The principal cases on the exception relating to merchants' accounts are, Inglis *v.* Haigh,

1. Although a debt may have been contracted abroad, any person who attempts to enforce it in this country must do so within the time limited by the English statutes; for it is by them, and not by the law of the place where the debt *455 was *contracted, that English courts are governed in a matter of this description. (*z*)

Foreign debts.

2. When once time has begun to run, no subsequent disability or inability to sue stops it. (*a*)

Continuous running of time.

3. Time begins to run from the moment the right to sue arises (*b*); but in a case of concealed fraud, from the moment when the person acquiring the right first becomes aware of it. (*c*)

When time begins to run.

4. The claim of *cestui que trust* against his trustee in respect of a breach of an express trust is not barred by mere lapse of time (*d*); although it is otherwise if the trust is only constructive. (*e*) In consequence of the first branch of this rule, if a partner dies, having made a will containing a trust for payment of his debts, his estate will be liable to the demands of creditors of the firm much longer than if there were no such trust in the will. (*f*)

Cases of trust.

5. After time has begun to run, and even after it has run, a debt may be revived by a written promise to pay it or by an acknowledgment in writing, from which a prom-

Revival of debts.

8 M. & W. 769; Cottam *v.* Partridge, 4 Man. & Gr. 271; Robinson *v.* Alexander, 8 Bli. N. S. 352; Forbes *v.* Skelton, 8 Sim. 335. See Webber *v.* Tyvill, 2 Wms. Saund. 124, and the note there.

(*z*) See The British Linen Co. *v.* Drummond, 10 B. & C. 903; Huber *v.* Steiner, 2 Bing. N. C. 202.

(*a*) See Rhodes *v.* Smethurst, 4. M. & W. 43, and 6 ib. 351; Goodall *v.* Skerratt, 3 Drew. 216; Wych *v.* East India Co. 3 P. W. 308. There is, however, an exception to this rule, where an action brought in time becomes abated, and another is afterwards commenced. See Sturgis v. Darrel, 4. H. & N. 622, and 6 ib. 120. See, as to how far merely landing at an English port is a return, so as to make time begin to run, Gregory *v.* Hurrill, 5 B. & Cr. 341, and 1 Bing. 324.

(*b*) This was so at law, even in cases of concealed fraud; The Imperial Gas Co. v. The London Gas Co. 10 Ex. 39; Hunter *v.* Gibbons, 1 H. & N. 459. See Bree *v.* Holbech, Dougl. 655. But see now, Jud. Act, 1873, § 24; Jud. Act, 1875, § 10, cl. 11, and the cases in the next note.

(*c*) South Sea Co. *v.* Wymondsell, 3 P. W. 143; Blair *v.* Bromley, 2 Ph. 354, and 5 Ha. 542; Petre *v.* Petre, 1 Drew. 397.

(*d*) See Jud. Act, 1875, § 10 cl. 2.

(*e*) Beckford *v.* Wade, 17 Ves. 87.

(*f*) See Ault *v.* Goodrich, 4 Russ. 430; Braithwaite *v.* Britain, 1 Keen, 206; Brown *v.* Gordon, 16 Beav. 302.

ise to pay it may be inferred (*g*), or by a payment on account of the principal *or interest due (*h*), from which a similar *456 promise may be implied. (*i*)

In order that the application of these general rules to partners may be fully understood, it becomes necessary to consider the extent to which one partner can affect the other by acknowledging and promising to pay, or by making payments on account of a partnership debt. The law upon this subject has been materially altered by the Mercantile law amendment act, but in order to understand its provisions a short allusion to the law as it previously stood is necessary. Prior to the act in question, it was held that :— Application of these rules to partners. Old law.

1. An admission by one of several joint debtors that their debt was still due, was not sufficient to take the case out of the statutes as against the others; nor even as against the person making the admission, unless it were in writing signed by him. (*k*) Admissions by one partner.

2. An actual promise by one of several joint debtors that the debt should be paid, was of no validity against any person except him who made it,[1] and not even against him unless it were in writing and signed by him. (*l*) Promise by one partner.

See, also, Pare *v.* Clegg, 29 Beav. 589, where a society's property was, on its dissolution, subjected to a trust for the payment of its creditors.

(*g*) *See* Tanner *v.* Smart, 7 B. & C. 603. The cases upon the question, what is a sufficient acknowledgment? are innumerable. The following are selected for reference :—Mitchell's claim, 6 Ch. 822, a letter without prejudice; Bourdin *v.* Greenwood, 13 Eq. 281, a mem. on a prom. note; Bush *v.* Martin, 2 H. & C. 311, entry by a committee in their minutes; letter asking for an account, Quincey *v.* Sharpe, 1 Ex. D. 72; Prance *v.* Sympson, Kay, 678. A letter from one partner to another will not avail a creditor whose debt is mentioned and recognized in it, *Re* Hindmarsh. 1 Dr. & Sm. 129.

(*h*) See Whitcomb *v.* Whiting, 1 Smith, L. C. and the note there.

(*i*)See Morgan *v.* Rowlands, L. R. 7 Q. B. 493.

(*k*) 9 Geo. 4, c. 14, § 1; Hyde *v.* Johnson, 2 Bing. N. C. 777; Bristow *v.* Maxwell, 11 Ir. Law Rep. 461. It was otherwise before the 9 Geo. 4, c. 14. See Manderston *v.* Robertson, 4 Man. & Ry. 440.

(*l*) See the last note.

[1] After the dissolution of a partnership, an acknowledgment and promise to pay, made by one of the partners, will not revive a debt against the firm which is barred by the statute of limitations. Van Keuren *v.* Parmelee, 2 N. Y. 523; Walsh *v.* Cane, 4 La Ann. 533; Kauffman v. Fisher, 3 Grant Cas. 302; Reppert *v.* Colvin, 48 Pa. St. 248. See also, Levy *v.* Cadet, 17 Serg. and R. 126; Yandis *v.* Lefavour, 2 Blackf. 371: Tate *v.* Clements, 16 Fla. 339; Folk *v.* Russell, 63 Tenn. 591.

Payment by one partner.

3. But as regards payment (*m*), it was held that if one of several joint debtors paid any money on account of the principal or interest due from them all, such payment was sufficient to take the debt out of the statute, not only as against the person making the payment, but as against all the others jointly liable with him. (*n*)[2] And this doctrine applied, although *457 *the statute had run before the payment was made (*o*); and to cases where the debt had been contracted by a firm, and that

Some cases, however, hold that the acknowledgment of a partnership debt, by one of the partners, after the dissolution, is sufficient to take the debt out of the statute. Smith *v.* Ludlow, 6 Johns. 267; Ward *a.* Howell, 5 Har. & J. 60; Neal *v.* Hassan, 3 McCord, 278; Greenleaf *v.* Quincy, 11 Me, 11. See also, Carroll *v.* Gayarré, 15 La. Ann. 671.

So, where one of several partners, after the dissolution of the partnership, assumed a partnership debt, but afterwards pleaded the statute of limitations, jointly with the other partners, to an action upon such debt, it was held that the promise of such partner might be given in evidence for the plea admitted that they did once assume. Brockenbrough *v.* Hackley, 6 Call, 51.

(*m*) As to payment by bills, see Gowan *v.* Forster, 3 B. & Ad. 507; Irving *v.* Veitch, 3 M. & W. 90; Turney *v.* Dodwell, 3 E. & B. 136.

(*n*) See Whitcomb *v.* Whiting, 2 Dougl. 652, and 1 Sm. L. C.; 9 Geo. 4. c. 14, § 1; Pease *v.* Hirst, 10 B. & C. 122; Wyatt *v.* Hodgson, 8 Bing. 309; Chippindale *v.* Thurston, 1 M. & Mal. 411.

(*o*) Channell *v.* Ditchburn, 5 M. & W. 494.

[2] A payment made upon a simple contract debt of a partnership, after its dissolution, by a partner authorized to settle the concerns of the partnership, and before the debt is already barred by the statute of limitations, is such an acknowledgment of the debt as will take it out of the statute as to all the co-partners. Houser *v.* Irvine, 3 Watts & S. 345.

After a firm has been dissolved, partial payment on a firm debt, made by one partner to a party who has had dealings with the firm and has had no notice of the dissolution, is evidence against all the partners, to prevent the running of the statute of limitations. Kenniston *v.* Avery, 16 N. H. 117.

A statute of Rhode Island provides that "whenever any co-partnership shall be dissolved, it shall and may be lawful for any individual who was embraced in such co-partnership to make a separate composition or compromise with any one or all of the creditors of such co-partnership; and such composition or compromise shall be a full and effectual discharge to the debtor making the same of the whole of said debt, and be taken and considered, in reference to the other co-partners, as actual payment of such debtor's proportion of the debts, whether the full amount of his proportion of said debt be actually paid or not." It also saves the creditor's action against the other co-partners for the balance due: *Held*, that a payment and compromise made by any one co-partner is wholly on his own individual account, and is not such an acknowledgment of indebtedness as will bind the other co-partners in reference to the statute of limitations. Turner *v.* Ross, 1 R. I. 88.

S. being liable for the debts of a firm, whether as a partner *inter sese* or as to third persons, after the firm went into

firm had been dissolved and the payment was made after the dissolution (*p*), and in collusion with the creditor and on the eve of the bankruptcy of the partner making the payment. (*q*) Even after one partner had become bankrupt, payment out of his estate was at one time held sufficient to take the debt out of the statute as against the others. (*r*) But payment by a surviving partner did not at law prejudice the estate of a deceased partner (*s*) any more than a payment by the executors of the deceased prejudiced the partners who survived (*t*); for the executors of a deceased partner are not liable jointly with the surviving partners. But if one of the surviving partners was an executor of the deceased, then a question of a different nature arose, turning not only on the effect of the payment as such, but on whether it was made by the survivors as surviving partners only, or as to one of them in his character of executor also. (*u*)

Liability in equity of estate of deceased partner.

The effect of the Statutes of Limitation upon suits in equity against the executors of a deceased partner was not well settled. In Winter *v.* Innes (*x*) Lord Cottenham expressed a doubt whether the executors could set up the statute where the surviving partner continued liable and had a right of contribution against them, and his lordship held that if the executors did not themselves set up the statute the surviving partner was not at liberty to do so for them. However, in Way *v.* Bassett

liquidation, gave to a partner of the firm an amount of money, to be applied by him towards the payment of the debts of the firm, such partner agreeing to pay the debts in full; such partner made a part payment on a claim against the firm: *Held*, sufficient to take the case out of the statute of limitations as to S., though the claimant may have recived no part of the identical money furnished by S.; and though the whole of the money so furnished may have been applied to the payment of other firm liabilities before any payment on the claims in suit. Burnet *v.* Snyder, 13 Jones & Sp. 577.

(*p*) Burleigh *v.* Stott, 8 B. & C. 36. The payment must, however, have been made on account of the partnership debt, Sims *v.* Brutton, 5 Ex. 802.

(*q*) Goddard *v.* Ingram, 3 Q. B. 839: a very strong case.

(*r*) Jackson *v.* Fairbank, 2 H. Blacks. 340; *Ex parte* Dewdney, 15 Ves. 499; *Ex parte* Woodward, 3 Deac. 294. But see Brandram *v.* Wharton, 1 B. & A. 463; Davies *v.* Edwards, 7 Ex. 22; and, as to an acknowledgment, Martin *v.* Bridges, 3 C. & P. 83.

(*s*) Atkins *v.* Tredgold, 2 B. & C. 23.

(*t*) Slater *v.* Lawson, 1 B. & Ad. 396.

(*u*) See Braithwaite *v.* Britain, 1 Keen, 206, where the payment prevailed; Way *v.* Bassett, 5 Ha. 55; Brown *v.* Gordon, 16 Beav. 302, where it did not. See, further, Griffin *v.* Ashby, 2 Car. & Kir. 139; Atkins *v.* Tredgold, 2 B. & C. 23.

(*x*) 4 M. & Cr. 101.

*458 (*y*) the statute was successfully relied upon as a defense *byt he executors of a deceased partner, although the surviving partners had by various payments kept the debt alive as against themselves. The law now is in accordance with the latter decision. (*z*)

Principle on which payment by one enures against all.

The doctrine that payment by one partner took a debt out of the statute as against all, was generally rested on the ground that the partner making the payment acted virtually as the agent for the rest. (*a*) But the right of one of several co-debtors (whether they are partners or not) to make a payment on account of the joint debt, is not derived from any authority conferred by the other debtors, for they have no right to prevent their co-debtor from relieving himself from a liability to which he is subject as much as they. Moreover, admitting that the doctrines of agency are applicable to payments made by one of several co-debtors, it is impossible to justify, on that ground, the decisions which have just been noticed. They were all, it is said, based upon this, that a part payment is evidence of a *new* promise to pay more. (*b*) But upon what principle can it be held, that after a partnership is dissolved, one partner has any implied authority from his late partners, to bind them by a fresh promise to pay an old debt? Assuming the debt to be already barred, the question can admit of no satisfactory answer, and yet the decisions went the length of binding the firm even in this extreme case. (*c*) The law upon this subject is, however, no longer what it was.

Alterations introduced by 19 & 20 Vict. c. 97.

By the Mercantile law amendment act, 19 & 20 Vict. c. 97, it is enacted as follows :—

§ 13. In reference to the provisions of the acts of 9 Geo. 4, c. 14, §§ 1 and 8, and 16 & 17 Vict. c. 113, §§ 24 and 27 (Irish), an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself. (*d*)

*459 *§ 14. In reference to the provisions of the acts 21 Jac. 1, c. 16, § 3; 3 & 4 Wm. 4, c. 42, § 3, and 16 and 17 Vict. c. 113, § 20 (Irish), when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any co-contractor, no such co-contractor or co-debtor, executor or ad-

Payments by one of several co-debtors.

(*y*) 5 Ha. 55.

(*z*) 19 & 20 Vict. c. 97, § 14, *infra*.

(*a*) See Whitcomb *v.* Whiting, 2 Dougl. 652.

(*b*) See Bateman *v.* Pinder, 3 Q. B. 574.

(*c*) There is an admirable American judgment on this subject, in Bell *v.* Morrison, 1 Peters, 351. It is to be found in Story on Partnership, § 324, note.

(*d*) This alters the law as laid down in Hyde *v.* Johnson, 2 Bing. N. C. 776.

ministrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only (*e*) of payment of any principal, interest, or other money, by any other or others of such co-contractors, or co-debtors, executors or administrators.

The above statute, it will be observed, has materially altered the law as regards the effect of acknowledgments and part payments. An acknowledgment by an agent being now sufficient to affect his principal, acknowledgment by one partner would probably be regarded as an acknowledgment by the firm: and notwithstanding § 14, a part payment by a partner would probably be regarded as a part-payment by the firm. (*f*)

Effect of above statute on partners.

But after a dissolution a part-payment by a continuing or a surviving partner will not prevent a retired partner (*g*), or the executors of a deceased partner (*h*) from availing themselves of the statute; and the same is true of an acknowledgment. (*i*)

TERMINATION OF LIABILITY (CONTINUED).

B. *In Companies.*

In conformity with the general principles of agency, the directors of a joint-stock company continue to have power to bind it, not only as long as their appointment lasts, but also *as long as its termination is unknown to the public. But this proposition must be taken in connection with the rule that the public are deemed to have notice of the contents of companies acts of Parliament, charters and registered deeds of settlement; and consequently, if it is sought to make a company liable for the acts done

*460

Duration of Directors' power to bind company.

(*e*) See, as to this word, Cockrill *v.* Sparkes, 1 H. & C. 699.

(*f*) See Watson *v.* Woodman, 20 Eq. p. 730.

(*g*) Ibid. 721.

(*h*) Thompson *v.* Waithman, 3 Drew. 628, in which the surviving partner was the sole executor of the deceased. In this case, § 14 of the act in question was treated as having a retrospective operation, and as destroying the effect of a payment made before the act passed. This, however, was a mistake. In every other respect the case is good law. As to the non-retrospective operation of § 14 of the statute, see Jackson *v.* Woolley, 8 E. & B. 778; Flood *v.* Patterson, 29 Beav. 295.

(*i*) If in any case it could be shown that a continuing or surviving partner was in point of fact authorized to act for the late partner or his executors in making acknowledgments or payments, the case would be different.

by its directors after their retirement from office, it must be ascertained whether, upon the principle alluded to, there was or was not constructive notice of the cessation of their authority to act for the company.

1. Termination of shareholders' liability in respect of future acts.

It has been seen that a member of an ordinary partnership may, even during the continuation of the partnership, determine the authority of his co-partners to bind him, by giving proper notice. This is, in truth, only an instance of the more general proposition, that an agent's authority is determinable by his principal at any time before the authority has been acted on. But as the directors of an incoporated company are the agents of the company, and not of the individual members, a notice by one of them to the effect that he will not be responsible for the future acts of its directors, would, it is conceived, be simply inoperative. As regards incorporated companies, the only mode in which a shareholder can escape liability for future acts of the directors is by duly severing his connection with the company.

When a shareholder ceases to be such, he obviously determines the authority conferred by himself upon the company and its agents to bind him. If he is a shareholder in a company which has no register of its members accessible to the public, he is in the position of a dormant partner, and consequently he cannot be made liable for what occurs after his retirement; and no notice of retirement is necessary except to those who knew him to be a shareholder. (*k*) But a person who is a shareholder in a company which has a register of its members accessible to the public, is *primâ facie* in a different position; and reasoning from analogy, a retiring shareholder ought in such a case to take care to have his name removed from the register, for so long as it is there he is held out as a *461 *shareholder. It is true that a person whose name is on the list of shareholders without his authority cannot be considered as holding himself out as a shareholder (*l*); but it is quite consistent with this proposition that a person who has been properly registered as a shareholder and has ceased to hold shares, but has taken no steps to

Effect of continuing on register.

(*k*) See Acc. Northey *v.* Johnson, 19 Law Times, 104 Q. B. 1852, the case of a shareholder in a cost-book mine.

(*l*) See Lyster's case, 4 Eq. 233; Birch's case, 2 DeG. & J. 10; Lofthouse's case, ib. 69; Powis *v.* Buller, 4 C. B. N. S. 469, affirming S. C. 3 ib. 645. See, also, *ante*, p. 50.

have his name removed from the register, has not, as between himself and the public, retired from the company; and if his liability to the public in respect of the company's debts and engagements depended upon ordinary principles of partnership law, that liability would continue until he gave notice to the public of his retirement by having his name removed from the register of shareholders. But here, as in other cases, the liability of shareholders turns on the wording of the statutes applicable to the companies in which they are shareholders, and too much reliance must not be placed upon the general principles applicable to partnerships.

Statutes must be looked to.

The Letters Patent act expressly enacts that a person ceasing to be a shareholder in a company to which that act applies, shall for all purposes of liability be considered as a continuing shareholder until the fact that he is not so has been registered. (*m*) But as regards companies governed by other statutes, it will be found that with respect to liability for future debts, their shareholders are in the position rather of dormant than of ostensible partners, their liability depending not so much on what appears from the company's register, as on the fact of membership, of which the register is only *primâ facie* evidence. (*n*)

2. Termination of shareholders' liability in respect of past acts.

Again, with respect to the liability of a late shareholder in a company for those debts and engagements of the company to which he was liable when he was a shareholder, it is necessary to consult the statute or charter by which the company in question is governed. Without referring to particular enactments at length, it may be stated generally that the ordinary principles of partnership law, as explained in the foregoing *pages, have not been materially departed from *462 in the case of ordinary joint-stock companies, except so far as regards the effect of lapse of time.

Summary of acts.

The Joint-stock banking act, 7 Geo. 4, c. 46, § 13, contains provisions continuing the liability of shareholders in respect of past debts until the lapse of three years after they have ceased to be shareholders. (*o*)

The Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73, § 24, continues

(*m*) 7 Wm. 4 & 1 Vict. c. 73, § 21.

(*n*) See the section in the next chapter on Execution against Companies and their Shareholders.

(*o*) The repealed acts, 7 & 8 Vict. c. 110, § 66; c. 113, § 10; and 19 & 20 Vict. c. 47, § 62, as to unlimited companies, contained similar provisions. But the 7 Geo. 4, c. 46, and 7 & 8 Vict. c. 110 and c. 113, only render a late

(*b*) The policy holder having refused to accept the new company. Griffith's case, 6 Ch. 374.

In order, however, to remove the difficulty of determining in these cases whether a policy-holder has or has not released the old office, it has been enacted by 35 & 36 Vict. c. 41, § 7, as follows:—

35 & 36 Vict. c. 41, § 7.

§ 7. Where a company, either before or after the passing of this act, has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company, who shall pay to the other company the premiums accruing due in respect of his policy, shall by reason of any such payment made after the passing of this act, or by reason of any other act done after the passing of this act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized.

But even in the case of policy-holders who have apparently accepted the new office, in lieu of the old, if it should appear that the amalgamation was *ultra vires* so that the new company is not liable to pay the policy, the old office will not be discharged. (*r*)

*465 *As regards persons who are actually creditors of the transferring company, they are not held to have released their original debtor simply by receiving payments from the new company and giving receipts to it (*s*); there must be some clear and distinct agreement to accept the new company as the debtor in lieu of the old; and where an annuitant who knew of the amalgamation had done nothing more than for several years receive his annuity from the new company and give receipts to it, the Court held that he had not ceased to be a creditor of the old company. (*t*) But creditors whose claims are limited to the funds of a company which has power to transfer those funds and its business, lose their rights against the company after it has transferred its funds and business to another. (*u*)

Actual creditors.

(*r*) See *Re* Saxon Life Assurance Society; The Anchor's case, 2 J. & H. 408, and on appeal, 1 DeG. J. & Sm. 29.

(*s*) Commercial Bank Corp. of India and the East, 16 W. R. 958, where there was no sufficient notice of the transfer of the business; and see *Ex parte* Gibson, 4 Ch. 662, where there was notice but a refusal to accept the new company.

(*t*) Family Endowment Society, 5 Ch. 118; Nat. Prov. Life Ass. Soc. 9 Eq. 306.

(*u*) Dowse's case, 3 Ch. D. 384.

*CHAPTER III. *466

OF ACTIONS BETWEEN PARTNERSHIPS AND COMPANIES AND NON-MEMBERS.

General observations.

In order to complete the subjects discussed in the preceding chapters (which determine the manner in which obligations are contracted by partnerships and companies, and the nature, extent, and duration of the direct liabilities to creditors of individual partners and shareholders in respect of such obligations), it is necessary to examine the remedies by which those obligations and liabilities can be enforced; and in connection with this subject it will be convenient to notice the remedies of which a partnership or company can avail itself for the purpose of enforcing its own rights against non-members.

It is unnecessary to dwell upon criminal prosecutions, for although partners may be prosecutors or prosecuted in respect of criminal offenses, the fact that they are partners has little, if any, effect on their position in a criminal point of view.

The remedies which alone are of sufficient importance to require consideration in a treatise like the present are actions, defenses by way of set-off, proceedings to enforce judgments, proceedings in bankruptcy, and proceedings to wind up companies. The subjects of bankruptcy and winding up will be discussed hereafter, and the present chapter will therefore be confined to actions, set-off, and execution.

SECTION I.—ACTIONS BY AND AGAINST PARTNERS.

The Judicature Acts, 1873 and 1875, and the rules issued under their authority, have materially altered and improved legal proceedings by and against partnerships and *unincorporated companies. They do not, however, render it unnecessary *467

to consider who ought to sue and be sued in respect of a given cause of action; and so far as the older decisions throw light upon this general question, they may still be usefully referred to.

General principle as to parties.

Every action presupposes some wrong done or contemplated; and this again presupposes some duty (*a*) owing by some one towards some one else and a breach actual or contemplated of such duty. For such breach, the person to sue is the person to whom the duty is owing; and the person to be sued is the person in whom the duty resides. If there are several such persons on either side, all ought to be joined, for otherwise there would be a multiplicity of actions when one would suffice.[1]

(*a*) The word is here used in its most general sense.

[1] The partners must all join as plaintiffs in an action to enforce a partnership claim; and this whether the action is brought before or after the dissolution of the partnership. Gallot *v.* McCluskey, 18 La. Ann. 259; Cochran *v.* Cunningham, 16 Ala. 448; Dob *v.* Halsey, 16 Johns. 34; Snodgrass *v.* Broadwell, 2 Litt. 353; Wright *v.* Williamson, 3 N. J. L. 978; Shutts *v.* Chaffee, 48 Wis. 617; Gage *v.* Rollins, 10 Metc. 348; Holt *v.* Kernodle, 1 Ired. L. 199. See, also, Pearson *v.* Parker, 3 N. H. 366.

Thus, if property held by a firm under pledge, is taken from the manual possession of one partner, he alone cannot replevy it. The action must be in the name of the firm. Saul *v.* Kruger, 9 How. Pr. 569.

Where one of several partners, to whom an indemnity is given, is compelled by legal proceedings to pay out moneys on account of a demand against his firm, the action to recover back the moneys thus paid may be brought in the name of all the members of the firm. Hill *v.* Packard, 5 Wend. 375.

Four persons formed a partnership in the ice business, under the name of G., H. & Co., and transacted their business in Charlestown (Mass.). The same persons and C afterwards, by written articles, formed a partnership, under the name of C. & Co., in the business of shipping ice to Mobile (Ala.) and selling it there. By these articles G., H. & Co. were to ship ice to Mobile, consigned to C. & Co., and C. was to devote his personal attention to the sale of the ice there, and C. & Co. were to pay from the proceeds of the sales, to G., H. & Co., a certain price per ton for the ice shipped at Charlestown, and also to pay rent for an icehouse in Mobile, and all freights and expenses on the ice shipped, and all expenses of discharging and transporting it from the vessels to the icehouse, and all other expenses of taking care of and selling it; and the proceeds of the sales, after deducting all said expenses, were to be equally divided between C. and the firm of G., H. & Co. R. made an agreement with the firm of G., H. & Co. to transport a cargo of ice for them from Charlestown to Mobile, but did not fulfill his agreement, and the four members composing that firm brought an action against him to recover damages for breach of that agreement: *Held*, that the action could not be maintained without joining C. as plaintiff. Gage *v.* Rollins, 10 Metc. 348.

One partner cannot recover against a sheriff for levying upon the firm property, on an execution against his copartner. Hughes *v.* Boring, 16 Cal. 81.

Where a written contract is entered

If the wrong done or contemplated is a breach of some general duty, and does not affect any individual in particular, the proper remedy is by indictment or by an action in the name of the Attorney-General.

into by an individual to do certain work, in a suit by him to recover the price of the work, the defendant may show that the plaintiff had a partner in the job, and that the partner had been paid in full. Shepard *v.* Ward, 8 Wend. 542.

In a suit on an obligation payable to himself "& Co.," plaintiff, who carries on business, as a firm using after his name "& Co.," must allege and prove that he alone is interested in the business, or he will be nonsuited. Ferguson *v.* King, 5 La. Ann. 642.

So, where a suit was brought in the name of certain persons, as composing a commercial firm, and the defendant excepted to the petition, upon the ground that all the members of the firm had not been joined in the action: *Held*, that where it was shown that the name of one of the persons used in the the style of the firm was omitted, the burden of proof was on the plaintiffs to show that they alone composed the firm. Rugely *v.* Gill, 15 La. Ann. 509.

After a guaranty had been made to a firm, one of its members retired, and the other partners paid the whole debt that the guarantor had stipulated to relieve the firm of: *Held*, that the late partner was not an improper party to a suit on the guaranty. Brown *v.* Haven, 37 Vt. 439.

If partners, as partners, are sureties for one who died insolvent, and a judgment against them on the note is satisfied by levy on the separate estate of one of them, the claim against the estate of the deceased principal is correctly made by and in the name of the partners. Parker *v.* Gregg, 23 N. H. 416.

A promise to one of a firm, to refund money belonging to the firm, inures to the benefit of the firm, and an action for it should be brought by the firm. Creel *v.* Bell, 2 J. J. Marsh. 309.

Where a vessel was built by several individuals, and advances were made by two part owners, who were partners, out of the partnership funds, the liability of the other owners for such advances is to the firm, and not to the several members of it. Stevens *v.* Lunt, 19 Me. 70.

Where, after the institution of suit in the names of the members of a firm, one of them dies, it is not error to file subsequently a declaration in the names of all of them, and then suggest the death of the deceased member. Byrne *v.* Schwing, 6 B. Mon. 199.

A commercial firm cannot demand in the same suit the payment of two promissory notes, although they are dated at the same place, and on the same day, and both payable to the firm under its firm name, where it is shown that such firm was composed of different persons, when the indebtedness was created which formed the consideration of one note, from those persons who composed the firm when the indebtedness was incurred which formed the consideration of the other note. It would be a case of distinct creditors joining in the same action their separate and distinct demands against the debtor. Dyas *v.* Dinkgrave, 15 La. Ann. 502.

The rule first above stated is the same, although the defendant at the time of the purchase was ignorant of the existence of the partnership. Bennett *v.* Scott, 1 Cranch C. C. 339.

A dormant partner, however, need not be joined in a suit in favor of the firm against their debtor. Waite *v.* Dodge, 34 Vt. 181; Hilliker *v.* Loop, 5

These general rules remain substantially unaffected by the Judicature acts; but several very important subsidary rules have been introduced by them; and these, so far as they have any special application to partnerships and companies, are as follows :—

Effect of the Judicature acts.

Vt. 116; Wood *v.* O'Kelly, 8 Cush. 406; Clarkson *v.* Carter, 3 Cow. 84; Clark *v.* Miller, 4 Wend. 628; Rogers *v.* Kichline, 36 Pa. St. 293; Curtis *v.* Belknap, 21 Vt. 433; Sylvester *v.* Smith, 9 Mass. 119; Wilson *v.* Wallace, 8 Serg. & R. 55; Cleveland *v.* Woodward, 15 Vt. 302; Blin *v.* Pierce, 20 id. 25; Hagar *v.* Stone, id. 106; Speake *v.* Prewitt, 6 Tex. 252; Desha *v.* Holland, 12 Ala. 513. See, also, Cookingham *v.* Lasher, 39 N. Y. 454; Bird *v.* McCoy, 22 Iowa, 549.

See, however, Secor *v.* Keller, 4 Duer, 416; and it has been held that an ostensible partner may maintain an action in his own name, without joining a dormant partner, although the latter was known to the defendant when the debt was contracted, and actually sold him the goods, for the price of which the action was brought. Monroe *v.* Ezzell, 11 Ala. 603.

If A, a member of a firm, deal in his own name in business of the firm with B, who is ignorant of the partnership, B may be sued for a demand against him, arising from such dealing, either by A alone or by the firm. And in a suit by the firm for such demand, B's right of set-off is the same as if B had sued alone. Ward *v.* Leviston, 7 Blackf. 466.

One of two partners of a law firm may maintain an action where the business respecting which a suit is brought, is uniformly done in the name of the party suing. A set-off will be allowed in such suit of a demand against the firm. Platt *v.* Halen, 23 Wend. 456.

If a partnership, upon its dissolution, convey all its effects to one of the firm, and, after such dissolution and transfer, a debtor of the firm promsie to pay the individual partner, he may maintain an action in his own name, on the promise. Howell *v.* Reynolds, 12 Ala. 128.

The liquidating partner of a commercial firm may sue in his own name, by representing the claim sued on as arising out of the business of the late firm, so as not to deprive the defendant of any means of defense to which he would be entitled in a suit in the name of all the partners. White *v.* Jones, 14 La. Ann. 681.

But it is held, that notwithstanding the firm business is done in the name of one partner, he alone cannot sue for the price of goods sold by the firm; but the other acting and ostensible partners cannot join as co-plaintiffs. Wilson *v.* Wallace, 8 Serg. & R. 53.

Where two partners were subjected to the payment of a debt of a third person, the one as surety, and the other as the heir of a co-surety, which debt was paid from the partnership funds: *Held*, that a separate action might be maintained by each against the principal for a moiety of the money paid. Gould *v.* Gould, 6 Wend. 263.

No rule of pleading or practice authorizes a recovery by an individual member of a firm, in his own name, on what his partners agree is his share of a debt due the firm. In all cases of indebtedness to a firm, the action must be brought by the members of the firm; nor does an agreement to divide the claims among themselves change the right. American Cent. R. R. Co. *v.* Miles, 52 Ill. 174.

But where two partners agree to divide a partnership debt, and the debtor consents to it, and promises one of the partners to pay a moiety to him, such part-

1. There is no distinction between legal and equitable rules as regards parties to sue and be sued. (*b*)

2. No action can be defeated by reason of the misjoinder or non-joinder of parties (*c*); and pleas in abatement are abolished. (*d*) If too many or too few persons join as plaintiffs, and the defendant can show that he is thereby prejudiced, he can apply to have the improper plaintiffs struck out, or the proper plaintiffs joined, as the case may be. (*e*)

ner may maintain an action for his moiety against the debtor. Blair *v.* Snover, 10 N. J. L. 153.

A dissolution of a partnership by the death of one of the partners, or otherwise, and an ajustment of the partnership concerns, will not be such a severance of a joint demand in favor of the partnership as will entitle either partner or his executor or administrator, to sue alone for his share, without the consent of the debtor to such severance; but all the partners, if living, must join in the action; and if any of them be dead, the action must be brought by the survivor or survivors. Peters *v.* Davis, 7 Mass. 257; Austin *v.* Walsh, 2 Id. 405.

One partner cannot maintain an action to recover a debt due to the firm, although he agreed to be responsible to the other partner for the payment of the debt, there having been no settlement between the partners making the claim a separate one. Cushing *v.* Marston, 12 Cush. 431.

An action on a claim due a firm may be maintained in the firm name, although one of the partners may be entitled to the proceeds if the claim itself has not been applied to extinguish the debt due such partner. White *v.* Savery, 50 Iowa, 515.

Where a suit is brought by several as partners, and one of them proves not to have been a partner and not a proper party, a verdict for all cannot be sustained. Travis *v.* Tobias, 8 How. Pr. 333.

Where one partner, who is agent of his co-partners, makes a contract in his own name, he may sue on that contract without joining his partners. Elancy *v.* French, 1 Blackf. 353.

An action for goods mortgaged to one partner to secure an indebtedness to the firm of which he is a member, is rightly brought in the name of the mortgagee alone. Trott *v.* Irish, 1 Allen, 481.

A partner who, by express stipulation in the articles of partnership (for the cultivation of a farm for a term of years), has "a lien on the produce of the said farm, and upon the stock and mules on said farm, to secure the payment of" his co-partner's notes for a half interest in them, and is authorized "to control the crops grown on said farm exclusively, and to sell the cotton," may maintain an action of detinue for the cotton in his own name. Pierce *v.* Jackson, 56 Ala. 599.

In an action upon a note payable to the order of the plaintiff alone, he was nonsuited, on the ground that the evidence showed that the money for which the note was given was advanced, and the note given in pursuance of a contract between the defendants and a firm of which the plaintiff was a member; and that therefore the plaintiff could not maintain an action alone, even if his partner, as between themselves, had

(*b*) See Order xvi.
(*c*) Ord. xvi. r. 13.
(*d*) Ord. xix. r. 13.
(*e*) Ord. xvi. r. 13.

3. All persons may be joined as plaintiffs, or as defendants, in or against whom the right to any relief claimed is alleged to exist, whether jointly or severally, or in the alternative. (*f*)

4. A plaintiff may at his option join, as parties to the *468 same *action, all or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes. (*g*)

5. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendent (*h*), provided no inconvenience is thereby occasioned. (*i*)

6. Parties required by a defendent to be joined for his indemnity or relief may be added. (*k*)

7. Where there are numerous parties having the same interest in one action, one or more of them may sue or be sued on behalf of all. (*l*)

8. Any two or more persons claiming or being liable as co-partners may sue or be sued in the names of their respective firms, if any (*m*);[1] and provision is made for the discovery of the individuals so suing or being sued. (*n*)

no interest in the note: *Held*, that the nonsuit was error. Mynderse *v.* Snook, 53 Barb. 234.

A partner making a sale is not a necessary party to an action by one member of a dissolved partnership against a purchaser from the other of certain partnership property, in which the plaintiff denies the right of his former partner to convey the entire interest in the property, and sues for the value of his interest. Hagendobler *v.* Lyon, 12 Kan. 276.

(*f*) Ord. xvi. rr. 1 and 3.

(*g*) Ord. xvi. r. 5.

(*h*) Ord. xvii. r. 6.

(*i*) Ib. r. 7.

(*k*) Ord. xvi. r. 17, *et seq.*

(*l*) Ord. xvi. r. 9.

(*m*) Ib. r. 10. See, as to service, Ord. ix. r. 6.

(*n*) Ib. and Ord. vii. r. 2. See, as to the old law, Woolf *v.* City Steam Boat Co. 7; C. B. 103. These rules do not apply to proceedings under the Bills of Exchange Act, See Pollock *v.* Campbell, 1 Ex. D. 50.

[1] Partners cannot sue nor be sued in their co-partnership name; the individual names must be stated. Blackwell *v.* Reid, 41 Miss. 102; Tomlinson *v.* Burk, 10 N. J. L. 295; Seeley *v.* Schenck, 2 N. J. L. 75; Crandall *v.* Denny, id. 137; Burns *v.* Hall, 3 N. J. L. 984; Bentley *v.* Smith, 3 Cai. 170; Tomlinson *v.* Burke, 10 N. J. L. 295; Porter *v.* Cresson, 10 Serg. & R. 257; Pate *v.* Bacon, 6 Munf. 219; Marshall *v.* Hull, 8 Yerg. 101; Smith *v.* Canfield, 8 Mich. 493; Barber *v.* Smith, 41 Mich. 138; Davis *v.* Hubbard, 4 Blackf. 50; Hughes *v.* Walker, id. 50; Faulkner *v.* Whitaker, 15 N. J. L. 438; Livingston *v.* Harvey, 10 Ind. 218; Holland *v.* Butler, 5 Blackf. 255.

Where plaintiff, assuming to act not as a corporation, but as a partnership, sues by a name importing a corporation, the point may be raised by an answer

With reference to this last rule, it is to be observed that the firm's name, when used in any action, is merely a convenient method of expressing the names of those who constitute the firm at the commencement of the action. The rule does not incorporate the firm (*o*); so that if A. is a creditor of a firm, B., C. and D., and B. [D.] retires and E. takes his place and the name of the firm continues un-

Actions in the mercantile name.

Changes in firm.

alleging want of parties in interest to the suit. Heaston *v.* Cincinnati, etc. R. R. Co. 16 Ind. 275.

Where partners sue, if their individual names appear in the petition, the name of the firm may be used in the citation. Andrews *v.* Ennis, 16 Tex. 45.

A summary process, in South Carolina, brought in the mercantile name of a firm, without setting out the partnership or the Christian names of the partners, is bad upon exception by plea, but not on motion for nonsuit. Martin *v.* Kelly, Cheves, 215.

A declaration in behalf of or against a partnership, by the name of "firm," without mentioning the names of the partners, is good after verdict. Pate *v.* Bacon, 6 Munf. 219; Seitz *v.* Buffum, 14 Pa. St. 69.

A complaint brought in a firm's name, but not stating the names of the members of the firm as plaintiffs, is defective and can be demurred to, but the defect cannot be availed of by appeal. Gilman *v.* Cosgrove, 22 Cal. 356.

Where a foreign firm is sued in its firm name, and answers, and a verdict is taken upon the defense set up in the answer, without objection to the irregularity, they will be deemed to have waived their strict legal right to object. Brownson *v.* Metcalfe, 1 Handy (Ohio), 188.

A judgment against a partnership in its firm name alone will support an action against an individual member of the firm, to enforce his individual liability for the firm debts. Cox *v.* Harris, 48 Ala. 538.

It is not competent for parties, by articles of agreement between themselves, to invest such person as a majority of them shall afterwards appoint, with power to sue in his own name for moneys agreed to be contributed by each partner to the general fund. Fortune *v.* Brazier, 10 Ala. 791.

In an action by a partnership, the record must show the individual names of the several partners; although the statute (Code of 1876, § 3038) dispenses with the necessity of proving them unless denied by plea verified by affidavit, and also (§ 2904) authorizes a suit against a partnership by its firm name. Moore *v.* Burns, 60 Ala. 269.

In a suit by a partnership, the name of the partners who compose the firm should be distinctly stated. Therefore, when in such a suit the record does not show the Christian names or surnames of the persons composing the firm, nor anything else upon which an amendment may be based, it is error to render judgment by default. Lanford *v.* Patton, 44 Ala. 584.

By Neb. Code, § 24, a partnership not incorporated, may sue in its firm name, but the course indicated by §§ 25, 26, must be strictly followed; in particular it must be shown that the company is formed for business purposes, etc. and is not incorporated, and security for

(*o*) As to the Scotch law from which the rule was taken, see Bullock *v.* Caird, L. R. 10 Q. B. 276.

changed, A. cannot maintain an action against B., C. and E. in the name of the firm, unless B., C. and E. have become or are content to be treated as his debtors. If in the case supposed, an action against the firm could be maintained at all, the firm would mean

costs must be given. Burlington, etc. R. R. Co. *v.* Dick, 7 Neb. 242.

Suit in the name of "Hanson Gregg, Albert Torrian and Mason Gregg, late co-partners, under the firm name and style of Gregg, Torrian & Co., plaintiffs:" *Held*, on demurrer, not brought under the provisions of section 24, c. 57, Gen. St., and it was not necessary that plaintiffs should state that such partnership "was formed for the purpose of carrying on trade or business, or for the purpose of holding any species of property in this State." Smith *v.* Gregg, 2 N. W. Rep. N. S. 459; s. c. 9 Neb. 213.

A proper construction of section 1 of the "act regulating suits by and against companies and partners," authorizing suits by and against companies not incorporated, in the firm name, limits its operation to companies formed for and doing business or holding property within this State. Haskins *v.* Alcott, 13 Ohio St. 210.

In Iowa, where a note is made payable to a firm by its name, it is advisable to declare thereon in the name of the firm; but if the names of the several partners are set out, it is not necessary to prove them. Gordon *v.* Janney, 1 Morr. 182; Bernard *v.* Parvin, id. 309.

In Iowa and Ohio partnership may be sued in the individual names of its members, as well as in its co-partnership name. Markham *v.* Buckingham, 21 Iowa, 494; Johnson *v.* Smith, 1 Morr. 105; Abernathy *v.* Latimore, 19 Ohio, 286.

Under the Illinois attachment law, partners may be sued in their firm. name. U. S. Express Co. *v.* Bedbury, 34 Ill. 459.

In an action by partners, it is not necessary to describe them as such in the writ. Tarlton *v.* Herbert, 4 Ala. 359.

In an action by partners of the same surname, it is not error if it is not added to every Christian name. Chance *v.* Chambers, 2 N. J. L. 384.

Plaintiffs may join in one suit several demands for debts contracted with them by the defendant under different firm names. Messner *v.* Lewis, 20 Tex. 221.

Where a note or bill is payable to a firm, strict proof is required that the firm consists of the plaintiffs on the record. M'Gregor *v.* Cleveland, 5 Wend. 475.

One partner can assign his interest in an open account due to the firm, to his co-partner, and the latter may become the real party in interest, so as to maintain a suit on the account in his own name. Swails *v.* Coverdill, 17 Ind. 337; Cook *v.* Beech, 10 Humph. 412. But see Horbach *v.* Huey, 4 Watts, 455.

One partner cannot maintain an action in his own name alone to recover a partnership debt, although his co-partners' interest has been assigned to him, without showing that the debt to the firm has been extinguished, and a new liability assumed to the plaintiff alone; and if a new contract be made, it must be declared on specially. De Grott *v.* Darby, 7 Rich. 118.

An indorsement by one partner in his individual name to his co-partner, of a promissory note payable to both of them or order, will not enable the indorsee to sue thereon in his own name. Estabrook *v.* Smith, 6 Gray, 570.

In a suit by the plaintiff as assignee of a firm on a promissory note against the maker, the declaration need not

B., C. and D., *i. e.*, A.'s real debtors ; but as they were not partners at the commencement of the action, the rule in question would, it is submitted, not apply to them.

Where all the partners cannot sue.

Again, if all the persons who are members of the firm at the commencement of an action cannot be all properly joined either as plaintiffs or as defendants, it would not be right to *use the name of the firm. It frequently happens that there are reasons which prevent the joinder as plaintiffs of all who *primâ facie* ought to be joined : in such a case those who cannot be so joined may be made defendants.[1] Thus if a firm has a cause of action, and one member has improperly released it, the other members can nevertheless maintain the action, joining him as a defendant, so that justice may be done both to the plaintiffs and to their opponents. (*p*) Again, the writer sees no reason why an action should not now be maintained for the recovery of a debt due from one partner to the firm (*q*) ; nor why, if two firms have a common partner, an action should not be maintained by one firm against the other ;[2] if not in their mercantile names, at any

*469

Two firms with common partner.

state the names of the persons composing the firm. Smith v. Blatchford, 2 Ind. 184.

A judgment in favor of "L. & M.," trading as a firm, is valid, and is competent evidence, in a suit brought by the firm, that the judgment was recovered by the partnership, their individual names being set out in full. Lash *v.* Arnold, 8 Jones L. 91.

[1] Where a demand exists in favor of a partnership, and one of the partners refuses to join in an action for its enforcement, he may be made a defendant with the partnership debtor, in a suit brought by his co-partner. Hill *v.* Marsh, 46 Ind. 218.

If one partner is omitted as plaintiff and made a party defendant with another person not a partner, and not representing the interests of one, the court will not have equity jurisdiction as it respects the latter. Reed *v.* Johnson, 24 Me. 322.

Where there were 100 partners, who had executed mortgages individually to the partnership to secure the debts of the concern, and some of the partners were dead, leaving numerous representatives: *Held*, that assignees of such mortgages might foreclose by separate suits against each partner, without making the others parties. Boisgerard *v.* Wall; 1 Smed. & M. Ch. 404.

(*p*) See the cases in the next note.

(*q*) Piercy *v.* Fynney, 12 Eq. 69; Taylor *v.* Midland Rail. Co. 28 Beav. 287, and 8 H. L. C. 751, show that suits in equity would lie in these cases in aid of legal rights.

[2] Where two companies are composed in part of the same individuals, no action at law can be maintained by one against the other. Portland Bank *v.* Hyde, 11 Me. 196; Green *v.* Chapman, 27 Vt. 236; Griffith *v.* Chew, 8 Serg. & R. 30; Eastman *v.* Wright, 6 Pick. 321; Burley *v.* Harris, 8 N. H. 235; Graham *v.* Harris, 5 Gill & J. 489; Rogers *v.* Rogers, 5 Ired. Eq. 31; Calvin *v.* Mark-

rate, by those members of one firm which are not common to both against the members of the other firm; *e.g.*, if there are two firms, A., B. and C. and A., D. and E., an action may, it is conceived, be now maintained by A., B. and C. against D. and E, or by B. and C. against A., D. and E., or *vice versâ;* and perhaps even by A., B., C. against A., D. and E.; for, although a person cannot sue himself, there would be no more difficulty in framing a proper judgment in the one form of action than another; and it would be absurd to say that in the case supposed there would be no remedy at all. (*r*)

Defenses to actions by partners founded on the conduct of one of them.

The Judicature acts and rules have greatly modified the old legal doctrine which prevented an action being sustained by partners when one fo them had precluded himself from maintaining it; or when the defendant had a defense to a claim by him.

As a general principle, what a person has no right to do himself, he cannot acquire a right to do by associating others *470 *with him. (*s*) Thus, it being a rule that a trustee cannot claim from his *cestui que trust* compensation for trouble, or loss of time in the execution of the trust, it has been held that if one of a firm of solicitors is a trustee, and the firm acts as solicitors in the matter of the trust, the firm cannot claim payment for its services; the disability of one of its members thus extending

ham, 4 Miss. 343; Haven *v.* White, 39 Ill. 509; Englis *v.* Furniss, 4 E. D. Smith, 587. See, also, Denny *v.* Metcalf, 28 Me. 389.

An action at law cannot be maintained by the members of a firm, on a written obligation for the payment of money to them, where one of the obligors is a member of the firm. Tindal *v.* Bright, Minor, 103.

Under the statute of Mississippi, declaring all notes joint and several, a member of a firm may be a co-plaintiff in a suit on a promissory note against another firm of which he is partner, provided he is not also joined in the action as defendant. Morris *v.* Hillery, 8 Miss. 61.

The rule first above stated has been modified by statute in Pennsylvania. See McFadden *v.* Hunt, 5 W. & S. 468; Hepburn *v.* Curts, 7 Watts, 300; Tassey *v.* Church, 5 W. & S. 468; McConkey *v.* Rogers, Brightley N. P. 450.

(*r*) Before the Judicature acts such actions could not be maintained, Bosanquet *v.* Wray, 6 Taunt. 598; 1 Wms. Saund. 291 *h*. But suits in equity could. See the cases in the last note. See as to the nonapplication of this rule at law to companies, Bosanquet *v.* Woodford, 5 Q. B. 310. As to estimating damages sustained by one firm by reason of being prevented from completing a contract made with another firm, some members being common to both, see Waters *v.* Towers, 8 Ex. 401.

(*s*) See, in addition to the cases cited, *infra*, book ii. c. 1, § 3, Notice, and Salomons *v.* Nissen, 2 T. R. 674.

to them all. (*t*) So if one member of a firm is guilty of fraud in entering into a contract on behalf of the firm, his fraud may be relied on as a defense to an action on the contract brought by him and his co-partners; for their innocence does not purge his guilt. (*u*) So if one partner resident abroad sells partnership goods, and he knows they are to be smuggled into this country, and he is privy to their being so smuggled, then, although his co-partners are innocent, the firm cannot recover the price of such goods. (*x*) So if one of several partners draws a bill in his own name, and the bill is accepted upon condition that he will provide for it when due, he cannot, by indorsing that bill to the firm to which he belongs, entitle himself and his co-partners to sue upon it. (*y*) In Astley *v.* Johnson, one of three partners purchased a bill in the partnership name, and undertook to pay for it at the end of a month. He remitted the bill to his co-partners in England, and they sued upon it. The bill, however, had not been paid for as agreed, and it was held that the plaintiffs were not entitled to recover, and were in no better position without their co-partner than they would have been had he been a co-plaintiff in the action. (*z*)

Astley *v.* Johnson.

In such cases as these the inability of the firm to sue is not removed by the death of the partner who has created the inability. Thus in *Ex parte* Bell (*a*), one of a firm advanced *money of the firm to a stranger for an illegal purpose; and it was held, after the death of the partner who advanced the money, that the survivors could not recover it from the person to whom it was lent. So if a firm has become bankrupt, its trustee is in general in no better position than the partners themselves would have been in, and is therefore frequently liable to be defeated on similar grounds. (*b*) But the trustee of a bankrupt partner can disaffirm and avoid such of his acts as are fraudulent as against his creditors, and con-

*471

Surviving partners prejudiced by conduct of deceased partner.

Ex parte Bell.

(*t*) See Broughton *v.* Broughton, 2 Sm. & G. 422, and 5 DeG. M. & G. 160; Christophers *v.* White, 10 Beav. 523; Collins *v.* Carey, 2 ib. 128; Matthison *v.* Clark, 3 Drew. 3.

(*u*) See Kilby *v.* Wilson, Ry. & Mood. 178.

(*x*) Biggs *v.* Lawrence, 3 T. R. 454.

(*y*) Sparrow *v.* Chisman, 9 B. & C. 241; and see Richmond *v.* Heaphy, 1 Stark. 202.

(*z*) Astley *v.* Johnson, 5 H. & N. 137.

(*a*) 1 M. & S. 751. See, also, Brandon *v.* Scott, 7 E. & B. 237, and compare Innes *v.* Stephenson, 1 Moo. & Rob. 147.

(*b*) Jones *v.* Yates, 9 B. & C. 532.

sequently acts of this nature afford no defense to an action by the trustee and the solvent partner. Thus in Heilbut *v.* Nevill (*c*), a solvent partner and the assignees of a bankrupt partner successfully maintained an action for a bill of the firm, given by the bankrupt to a creditor of his own, under circumstances which amounted to a fraudulent preference.

Heilbut v. Nevill.

Owing to the old technical rules relating to the joinder of parties to actions, the principle above discussed was, moreover, applied at law to cases where it produced great injustice; viz., to cases where one partner acted in fraud of his co-partners. For example, where a partner pledged partnership property, and in so doing clearly acted beyond the limits of his authority, still, as *he* could not dispute the validity of his own act, it was held at law that he and his co-partners could not recover the property so pledged. (*d*) So although a partner has no right to pay his own separate debt by setting it off against a debt due from his creditor to the firm, yet if he actually agreed that such set-off should be made, and it was made accordingly, it was held at law that he and his co-partners could not afterwards recover the debt due to the firm. (*e*) [1] So where a firm of three partners deposited goods upon the terms that they were not to be parted with except on the joint authority of all three partners, and they were nevertheless given up to one of them, it was held at law that the firm could sustain no action for the recovery of the goods. (*f*)

Frauds by one partner on the firm.

*472 In such cases as observed *by Lord Tenterden, in Jones *v.* Yates (*g*) there is no instance "in which a person has been allowed as plaintiff in a court of law to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person."

In such cases as these, however, relief might have been had in equity (*h*): and it is apprehended that the cases at law above re-

(*c*) L. R. 4 C. P. 354.

(*d*) Brownrigg *v.* Rae, 5 Ex. 489.

(*e*) See Wallace *v.* Kelsall, 7 M. & W. 264; Gordon *v.* Ellis, 7 Man. & Gr. 607. Compare Kendal *v.* Wood, L. R. 6 Ex. 243, where the technical difficulty did not arise.

[1] See *ante*, 277, note.

(*f*) Brandon *v.* Scott, 8 E. & B. 234.

(*g*) 9 B. & C. 532, and see Richmond *v.* Heaphy, 1 Stark. 202.

(*h*) Piercy *v.* Fynney, 12 Eq. 69; Midland Counties Rail. Co. *v.* Taylor, 8 H. L. C. 751, affirming, Taylor *v.* Midland Counties Rail. Co. 28 Beav. 287.

ferred to can no longer be relied upon; the Judicature acts having removed the technical difficulties which led to their decision.

If a partner in collusion with a debtor to the firm gives him a receipt for his debt although no payment, or anything equivalent to payment is made, an action for the recovery of the debt is nevertheless maintainable by the firm, *i. e.*, by the partner giving the receipt and his co-partners. (*i*) For a receipt does not preclude the person givin git from showing that the money therein expressed to be received, was not in fact received (*k*), nor does it discharge the debt. Again, a right of set off which might be pleadable to an action brought by one partner, is not pleadable to an action by him and his co-partners (*l*); nor if one partner covenants not to sue for a partnership debt, will this preclude him from joining with his co-partners in an action for the recovery of that debt. (*m*) In each of these cases there is only a right of cross action against the one partner; and although such right might be relied on as a defense to an action by him alone, it is held not to affect the firm to which he belongs.

The conclusion to be drawn from the foregoing cases appears to be that the conduct of one partner affords a defense to an action by him and his co-partners, or by them without him, where they are bound by his act, either by adopting and seeking the benefit of it (*n*), or upon the ground that it is on *ordinary principles of agency the act of the firm; and *473 binding upon him and his co-partners accordingly. But the cases at law which go further than this cannot, it is submitted, be now relied upon.

Result of the decisions.

The power of one partner to act for the firm in judicial proceedings, may be coveniently noticed in the present place.

Power of one partner to act for the firm.

A partner may sue in the name of himself and co-partners, without their consent (*o*);' but if he sues against their consent, he must indemnify them against the

One partner suing in the name of the firm.

(*i*) Henderson *v.* Wild, 2 Camp. 561; Farrar *v.* Hutchinson, 9 A. & E. 641.

(*k*) Skaife *v.* Jackson, 5 Dow. & Ry. 290.

(*l*) See *infra*, book ii. c. 2, § 3.

(*m*) See Walmsley *v.* Cooper, 11 A. & E. 216.

(*n*) As in *Ex parte* Bell, 1 M. & S. 751; Broughton *v.* Broughton, 5 DeG. M. & G. 160.

(*o*) Whitehead *v.* Hughes, 2 Cr. & M. 318; and see Harwood *v.* Edwards, Gow on Part. 65, note, where it was held by Chapple, J., that the action must be considered as brought by all. See below, note (*r*).

[1]The right of a partner to collect the

costs. (*p*) So one partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing, if he acts against the will of the other partners. (*q*)[2]

One partner staying proceedings.

But if it is competent for one partner to sue for the firm, it is as competent to any other partner to stay proceedings, or to put an end to the action altogether by means of a release; and although the Court will not allow this to be done by

debts of the partnership, and to commence suits for that purpose, is an incident to the partnership, which survives the dissolution, and is inherent in either partner. Ward *v.* Barber, 1 E. D. Smith, 423.

Any member of a firm has the right to use the name of the firm in perfecting a mechanic's lien to which the firm is entitled; and the validity of the lien is not impaired by the fact that before the filing of the account for that purpose in the firm name, one of the members of the firm has become sole owner of the claim and the account contains a recital of that fact, and declares that he alone is entitled to the benefit of the the lien. Jones *v.* Hurst, 67 Mo. 568.

(*p*) Whitehead *v.* Hughes, 2 C. R. & M. 318.

(*q*) In Goodman *v.* De Beauvoir, 12 Jur. 989 and 1037, a solicitor employed by a managing committee to defend a suit, was held authorized to enter an appearance for a member of a provisional committee, who had made the managing committee his agents.

[2] When a suit is commenced against a firm, one of the partners has power to employ an attorney to attend to the suit; and an appearance, entered by such attorney, will be binding upon the other partners. Bennett *v.* Stickney, 17 Vt. 531. See, also, Wheatley *v.* Tutt, 4 Kan. 240.

One member of a dissolved partnership has, however, no authority, unless specially given, to retain an attorney to defend the other members of the late firm in an action brought against them. Such authority does not result from the partnership itself. Bowler v. Huston, 30 Gratt. 266.

And after the dissolution of a partnership, one of the parties cannot authorize an appearance for the other. Haslet *v.* Street, 2 McCord, 311; Loomis *v.* Pearson, Harp. 470.

A delaration was served on one partner only, and he employed an attorney, and authorized him to give a *cognovit* which he did for both, in good faith. The attorney being responsible, the court refused to set aside the judgment, but permitted the partner who had not been brought in, to contest the validity of the claim. Grazebook *v.* McCreedie, 9 Wend. 437. The rule is different where the attorney is irresponsible. Groesbeck *v.* Brown, 2 How. Pr. 21.

In an action against partners, on only a part of whom process has been served, a plea filed for defendants generally, without naming them, will not be considered as the plea of all. Boyce *v.* Watson, 3 J. J. Marsh 498.

The entry by an attorney, of his general appearance for the defendants, in an action against a partnership, must be construed to be an appearance for the partners as partners, and for the purpose of defending the action against the partnership, and not as an appearance for the partners individually, severally, and personally, so as to render a judgment against the partnership, in such action, binding on an individual partner in another jurisdiction, by whom such appearance was not authorized. Phelps *v.* Brewer, 9 Cush. 390.

collusion with the defendant, for the purpose of defrauding the other partners of their rights (see *ante*, p. 293), a release will be effectual where there is no fraud in the case.

Harwood v. Edwards.

In Harwood *v.* Edwards (*r*), one of three partners, without the knowledge or consent of the other two, brought an action in his name and theirs for the recovery of a debt due to the firm. The other two afterwards agreed with the defendant that proceedings should be staid; and the Court held that this agreement bound all three; and proceedings were stayed accordingly, although the partner who promoted the action disputed the validity of the agreement, and, by the partnership articles, it had been agreed between the partners, that one of them should not give a release without the assent of the others.

Consenting to arbitration.

If an action is brought for the recovery of a debt due to the *firm, one of the partners cannot bind the firm by consenting to a judge's order referring all matters in difference between the plaintiffs and the defendant to arbitration. (*s*)[1] *474

Consenting to judgment, &c.

In an action against a firm it has been held that one partner has no authority to bind the firm by consenting to an order for a judgment against it (*t*); or by giving a *cognovit* to pay the debt and costs. (*u*)[2] But a warrant of attorney execu-

(*r*) Gow on Part. 65, note.

(*s*) Hatton *v.* Royle, 3 H. & N. 500.

[1] See *ante*, 265, and note.

(*t*) Hambridge *v.* De la Croúée 3 C. B. 742.

(*u*) Rathbone *v.* Drakeford, 4 Moo. & P. 57.

[2] A partner has no power to bind his co-partner by a confession of judgment against the firm; but if such a judgment be confessed, it will bind the partner who did it, and be void as to the other. Bitzer *v.* Shunk, 1 Watts & S. 340; Sloo *v.* State Bank, 1 Scam. 428; York Bank's appeal, 36 Pa. St. 458; Christy *v.* Sherman, 10 Iowa, 535; Edwards *v.* Pitzer, 12 id. 607; North *v.* Mudge, 13 id. 496; Crane *v.* French, 1 Wend. 311; Barlow *v.* Reno, 1 Blackf. 252; Everson *v.* Gehrman, 1 Abb. Pr. 167: Shed *v.* Bank, etc. 32 Vt. 709; Remington *v.* Cummings, 5 Wis. 138. See, also, Mills *v.* Dickson, 6 Rich. 487; Waring *v.* Robinson, 1 Hoff. 524; Conery *v.* Rotchford, 30 La. Ann. 692. See, however, Lahey *v.* Kingon, 13 Abb. Pr. 192; S. C. 22 How. Pr. 209; Hewitt *v.* Patrick, 26 Tex. 326.

A confession of judgment for a partnership debt, after a dissolution, binds only the partner making it. Herrick *v.* Conant, 4 La. Ann. 276; Mitchell *v.* Rich, 1 Ala. 228; Bennett *v.* Marshall, 2 Miles, 436; Morgan *v.* Richardson, 16 Mo. 409.

Though one partner cannot confess a judgment against another partner, even for a partnership debt, yet a creditor of the firm cannot be permitted to make objection to the judgment on that account; and a sale of partnership property, on an execution issuing from such

ted by one partner in the name of the firm with the consent of the other partners, is not invalid, simply because the others have not executed it. (*x*) A judgment entered up against a company by consent binds the company, unless there has been fraud or collusion on the part of the plaintiff. (*y*)

Costs.

If in an action costs are ordered to be paid to one partner, payment to another partner is not sufficient. (*z*)

Service on one partner.

One partner is not the agent of his co-partner, except as to partnership matters; and if one partner is sued in respect of some private affair of his own, he must be proceeded against like any other individual, and service of writs,

judgment, will pass a perfect title to the purchaser; and, if the first lien, will be entitled to the proceeds of the sale; but the judgment will not affect the persons nor the separate property of the other partners. Grier *v.* Hood, 25 Pa. St. 430.

And in Ross *v.* Howell, 84 Penn. St. 129, it was held that the interest of all the partners in the partnership property may be sold under an execution upon a judgment confessed by a single partner in the firm name and for a firm debt. Ross *v.* Howell, 84 Pa. St. 129.

Under Oregon Code, 202, § 252, a judgment by confession of one partner does not bind his co-partners in the partnership property, unless made in an action pending. Richardson *v.* Fuller, 2 Oreg. 179.

A judgment confessed by one of two co-partners, using a corporate name, may bind the other, if the circumstances create a belief that he knew of it and intended to be bound. Bivingsville Manuf. Co. *v.* Bobo, 11 Rich. 386.

Where one of the partners of a firm executed a warrant of attorney, under seal, for himself and as attorney for his partner, authorizing the confession of a judgment, the court refused to set aside the judgment on the sole application of the defendant, who had executed the warrant of attorney. St. John *v.* Holmes, 20 Wend. 609.

A confession of judgment by one partner for a partnership debt, does not discharge the other partners from liability for the same debt, since the act of April 6, 1830. Kauffman *v.* Fisher, 3 Grant Cas. 302.

Where partners are sued, one of them has no power to offer judgment under the Code, on behalf of himself and his co-partner, without some evidence that his co-partner authorized him to make the offer, or assented to it. But the appearance of an attorney for both on the record may make the judgment regular. Binney *v.* Legal, 19 Barb. 592.

Where a bond with a warrant to confess judgment is executed by one partner, and subsequently all the partners revive the judgment by their attorney, this is a ratification. Overton *v.* Tozer, 7 Watts & S. 331; Cash *v.* Tozer, 1 Watts & S. 519.

Where a warrant of attorney to confess a judgment was executed in the firm name of the defendants: *Held*, on error, that the court would intend that the warrant, although executed by one partner only, was adopted by the others. Bissell *v.* Carville, 6 Ala. 503.

(*x*) Brutton *v.* Burton, 1 Chitty, 707.

(*y*) *Ex parte* Chorley, 11 Eq. 157; Williams *v.* St. George's Harbor Co. 2 DeG. & J. 547; Green *v.* Nixon, 23 Beav. 530.

(*z*) Showler *v.* Stoakes, 2 Dowl & L. 3.

&c., must be made accordingly, and they must not be left at the place of business of the firm, or be served on the other partners. (*a*) And even in proceedings relating to partnership matters, although service on one partner is sometimes held equivalent to service on all, this is not the case where the service is relied on as the foundation of process of contempt, or of any proceedings of a penal nature. (*b*)

*Where partners are sued in the name of the firm, service of the writ on one of them is sufficient (*c*);[1] but all the partners must appear individually in their own names. (*d*) *475

(*a*) See Petty *v.* Smith, 2 Y. & J. 111; Fairlie *v.* Quin, 1 Smythe, 189. See as to substituted service, Leese *v.* Martin, 13 Eq. 77, and as to delivering a solicitor's bill of costs, Eggington *v.* Cumberledge, 1 Ex. 271.

(*b*) Young *v.* Goodson, 2 Russ. 255; and see Moulston *v.* Wire, 1 Dowl. & L. 527; *Re* Holliday, 9 Dowl. 1020; Grant *v.* Prosser, Smith & Batty, 95; Murray *v.* Moore, 1 Jo. Ir. Ex. 129; Nolan *v.* Fitzgerald, 2 Ir. Com. Law. R. 79; Kitchen *v.* Wilson, 4 C. B. N. S. 483. In Leese *v.* Martin, 13 Eq. 77; Carrington *v.* Cantillon, Bunb. 107; and Coles *v.* Gurney, 1 Madd. 187, service of bill on one partner was allowed, the other being abroad; and in ejectment against a firm, service on an acting partner is sufficient, Doe *v.* Roe, 9 Dowl. 1039, and in an action against a firm on its promissory note, the rule to compute (after judgment by default), need only be served on one of the defendants. Figgins *v.* Ward, 2 Cr. & M. 424; Carter *v.* Southall, 3 M. & W. 128.

(*c*) Ord. ix. r. 6.

(*d*) Ord, xii. r. 12.

[1] To the point that service of process on one partner is not equivalent to service on all, see Rice *v.* Doniphan, 4 B. Mon. 123; Faver *v.* Briggs, 18 Ala. 478; Duncan *v.* Tombeckbee Bank, 4 Port. 181; Demoss *v.* Brewster, 12 Miss. 661; Scott *v.* Bogart, 14 La. Ann. 261; Beal *v.* Snedicor, 8 Port. 523.

A judgment rendered in another State against all the members of a partnership, after the dissolution of the partnership, does not personally bind a member of said partnership not served with process and not appearing in the case, although the other members were served or appeared and caused an appearance to be entered for all. Bowler *v.* Huston, 30 Gratt. 266.

A judgment in New York under the Code of procedure of that State against the members of a dissolved partnership, one of whom was not served with process and did not appear in person or by attorney in the suit, is not such a judgment as is contemplated by the Constitution and Act of Congress as to such person. Bowler *v.* Huston, *supra.*

Partnership property, or the separate property of the partner served, may, however, in many of the States, be subjected to the debts of the partnership by service of citation on one member of the firm. Alexander *v.* Stern, 41 Tex. 193; Hale *v.* Van Saum, 18 Iowa, 19; Flannery *v.* Anderson, 4 Nev. 437; Brooks *v.* McIntyre, 4 Mich. 316; Kidd *v.* Brown, 2 How. Pr. 20; Stoutenburgh Vanderburgh, 7 id. 229.

See, also, Matter of Lowenstein, 7 How. Pr. 100.

Where A obtained judgment against three partners, J. K. and L., by service of process upon K. alone, who confessed judgment: *Held*, that the partners not

These matters, however, fall within the province of a treatise on practice, and not within the scope of the present work.

Having made these general observations, it will be convenient to consider, in the first place, the general rules which apply to actions by and against partners, when there has been no change in the firm between the time when the right sought to be enforced accrued, and the time when proceedings are taken to enforce it; and then to consider how far those rules apply or have to be modified when a change has taken place.

served could not be proceeded against by warrant under the non-imprisonment act founded upon such judgment, though they were shown to have possession of partnership property which they refused to apply in payment of the judgment, it being against the policy of the law to allow one partner acting against the wishes of the firm, to give a preference to creditors by assignment or otherwise. *In re* Lowenstein, 7 How. Pr. 100.

If firm property has been *bonâ fide* conveyed to one, it cannot be subjected to a judgment against the firm to which he was not made a party, upon a mere suggestion, on an attempt to levy on the property, that he was a co-partner, as that would be to bind him as a partner without notice or suit, and without any regular proceeding against him as such. Strong *v.* Hines, 35 Miss. 201.

Where a suit is brought against a firm, the name of one of the partners composing which is alleged to be unknown, a judgment cannot be rendered against the firm so far as concerns the unknown partners; but where the other partner, not having been personally cited, appeared and filed general denial, and, upon judgment being rendered against the firm, appealed as a partner: *Held*, that he was bound by the decree. Grieff *v.* Kirk, 15 La. Ann, 320.

In an action against a partnership, setting out the individual names of the several partners, the present statute of Alabama (Rev. Code, § 2538), unlike the former (Clay's Digest, 323, § 63), does not authorize a judgment by default against all the defendants, when process has been served on only a portion of them. Shapard *v.* Lightfoot, 56 Ala. 506.

In Iowa, service upon one member of a firm is sufficient to give the court jurisdiction over the other members of the firm. Gregory *v.* Harmon, 10 Iowa, 445; Walker *v.* Clark, 8 Iowa, 474; Saunders *v.* Bentley, id. 516.

But a service made on one partner after a dissolution of the firm, is insufficient in a case where the interest of the partner upon whom the service is made is adverse to that of the partners who are not served with notice. Stephens *v.* Parkhurst, 10 Iowa, 70.

In Lousiana persons associated together for carrying personal property for hire in vessels, are commercial partners, and may be cited in the manner prescribed for the citation of such associations; but it is only where they are associated together under a title, or as a firm, that the service of a citation addressed to the partnership in its social name, made on one of its members only, is sufficient. Hefferman *v.* Brenham, 1 La. Ann. 146.

Suit being brought against R. F. and C. W., as composing the commercial firm of R. F. & Co., and the petition and citation served on R. F. alone: *Held*, that the service of citation was sufficient as to both partners. Kearney *v.* Fenner, 14 La. Ann. 870.

1. *Actions by and against partners where no change in the firm has occurred.*

A. *Actions in respect of legal rights.*

(*a.*) *Actions by the firm.*

(*b.*) *Actions ex contractu.*

In order to determine who ought to sue on behalf of a firm upon a contract made with it, it is necessary to distinguish between

1. Contracts under seal.
2. Bills of exchange and promissory notes.
3. Other contracts.

1. As regards contracts under seal, the old rule was that if such a contract was entered into with one partner only, he alone could sue upon it; and that if it was entered into with more than one partner, all those with whom it

1. Actions by partners on contracts under seal.

Where a defendant is sued as silent partner in a commercial firm, service of citation on the clerk of the firm is not sufficient. Ridge *v.* Alter, 14 La. Ann. 866.

Where, in an action on a claim for supplies furnished to a steamer, the proceedings are not *in rem*, and the owners are not shown to have had a social name and citation was served on but one of the two owners, the judgment, though rendered against the part owner, who was cited, and against the steamer itself, cannot be executed by seizing the whole boat. The part owner, who was not cited, and made no appearance, must be regarded as a stranger to the proceedings; and he may arrest the sheriff in any attempt to seize his share of the boat to satisfy the judgment; and he is not bound to notice the proceedings until an attempt is made to seize his share of the boat. Hefferman *v.* Brenham, 1 La. Ann. 146.

Where partners are sued upon a partnership debt, and there is a regular return of service as to one, and no return of any kind as to the other, the latter may come in pending the suit, even as late as the regular trial term, and acknowledge that he has been duly duly served, waive copy and previous entry of service, and consent that the case then stand for trial. Judgment rendered at or after the second term succeeding the entering and signing of such acknowledgment on the declaratoin will affect third persons the same as if the evidence of service had been complete at first. Oates *v.* Brown, 59 Ga. 711.

In a suit against two as partners, where service is made only on one, and the officer returns *non est inventus* as to the other, if the one served dies, the plaintiff may, under the act of 1820, make his legal representatives parties, and proceed to judgment and execution against them. Ross *v.* Everett, 12 Ga. 30; Wright *v.* Harris, 24 Ga. 415.

As to the effect of the acceptance of service of process by one partner, see Bowen *v.* Sutherlin, 44 Ala. 278; Clark *v.* Stoddard, 3 Ala. 366; Demott *v.* Swain, 5 Stew. & P. 293; Bright *v.*

was expressly entered into must sue upon it, and no others could, whatever their interest in its performance might be. (*e*) But *476 their joinder *will now be of no consequence, unless the defendant is prejudiced by it. (*f*)

Covenant with A. & Co.

It is apprehended that a covenant entered into with A., B. & Co., may be sued upon by the persons who, when the covenant was made, constituted that firm.

2. Actions by partners on bills and notes. Blank indorsements.

2. As regards bills of exchange and promissory notes. If they have been indorsed in blank any person holding them may sue upon them. (*g*)

Special indorsements.

When a bill or note is not indorsed in blank, the proper persons to sue upon it are those named in the instrument as drawers, payees, or indorsees, as the case may be. (*h*) Whether they are partners or not is of no consequence; and therefore if a bill is drawn in the name of two persons as if they were partners, they ought both to join in an action on the bill, although one of them has no interest in it. (*i*) So it is immaterial whether the bill or note relates to partnership matters or not, for if a debtor to a firm makes his promissory note payable to one of the partners only, such one is the proper person to sue on the note. (*j*)

Bills in name of A. & Co.

If a bill is drawn by or in favor of a firm in its commercial name the persons who composed the firm when the bill was drawn, ought to be plaintiffs. (*k*) But they can now sue in their mercantile name. (*l*)

Bills accepted for honor.

If one partner in his own name accepts a bill drawn on a stranger for his honor, and pays the bill when due out of the funds of the partnership with the consent of his

Sampson, 20 Tex. 21; Freeman *v.* Carhart, 17 Ga. 348.

(*e*) See the note to Cabell *v.* Vaughan, 1 Saund. 291, *i*; Metcalf *v.* Rycroft, 6 M. & S. 75; Scott *v.* Godwin, 1 Bos. & P. 67; Vernon *v.* Jeffrys, 2 Str. 1146.

(*f*) Ord. xvi. r. 13.

(*g*) See Ord *v.* Portal, 3 Camp. 239; Attwood *v.* Rattenbury, 6 Moore, 579; Lowe *v.* Copestake, 3 Car. & P. 300. See, also, Law *v.* Parnell, 7 C. B. N. S. 282, in which the manager of a joint-stock bank was held entitled to sue, in his own name, on a bill indorsed in blank and given to him by a customer of the bank on account of advances made by it to him; Machell *v.* Kinnear, 1 Stark. 499, is rendered unimportant by Ord. xvi. rr. 1 and 13.

(*h*) See Pease *v.* Hirst, 10 B. & C. 122.

(*i*) Guidon *v.* Robson, 2 Camp. 302. *Sed quære* now. See Ord. xvi.

(*j*) Bawden *v.* Howell, 3 Man. & Gr. 638.

(*k*) McBirney *v.* Harran, 5 Ir. Law Rep. 428; Phelps *v.* Lyle, 10 A. & E. 113.

(*l*) *Ante*, p. 468.

co-partners, the partner who accepted the bill is the proper person to sue the drawee for indemnity. (*m*)

*3. With respect to other simple contracts, whether written or verbal, where a contract is entered into with several persons jointly, they should all join in an action upon it (*n*). But if a simple contract, written or verbal, expressed or implied, has been entered into with an agent, it may be sued upon by his principal, even if undisclosed, provided he can show that in point of fact the agent contracted on his behalf. (*o*)[1] *477

3. Actions by partners on ordinary contracts.

This doctrine is constantly applied in partnership cases; it happens every day that a firm sues on a contract entered into on its behalf by one of its members, and it is not by any means necessary that the person dealing with him should have been aware that the one partner was acting on behalf of himself and other people.[2] The question is, With whom was the contract made in point of law? And the true answer to this question does not by any means entirely depend on the answer to be given to the more simple question, With whom was the contract made in point of fact?

All may sue though not named.

Thus in Garrett *v.* Handley (*p*) all the members of a firm were held entitled to sue on a written guarantie given to one of the partners only, there being evidence to show to show that the guarantie was intended for the benefit of the firm. So, where a member of a firm of bankers was asked for a loan, and he made it out of the funds of the bank, it was held that an action for the recovery of the money lent was properly brought by all

Garrett v. Handley.

(*m*) Driver *v.* Burton, 17 Q. B. 989.

(*n*) 1 Wms. Saund. 291 *k*, and 1 Chitty on Plead. 10–15. Formerly mistakes in this respect were fatal, but see now Ord. xvi. r. 13.

(*o*) See Phelps *v.* Prothero, 16 C. B. 370; Sims *v.* Bond, 5 B. & Ad. 389. See, also, Beckham *v.* Drake, 9 M. & W. 79, and 11 ib. 315, noticed *ante*, p. 338, and Freeman *v.* Loder, 11 A. & E. 589, as to suing undisclosed principals on written contracts. Foreign principals, as a rule, do not enter into contracts in this country through agents. The agents here themselves contract as principals, though acting for others. See Elbinger Actien Gessellschaft *v.* Claye, L. R. 8 Q. B. 313; Hutton *v.* Bulloch, L. R. 8 Q. B. 331, and 9 ib. 572.

[1] See Ewell's Evans on Agency, 304, 379, 401, and notes.

[2] See *ante*, 467, note.

(*p*) 4 B. & C. 664. See the same case, 3 B. and C. 462, where an action by the one partner failed. See Hopkinson *v.* Smith, 1 Bing. 13, as to actions by attorneys not retained by the defendant.

the members of the firm, although the borrower had not requested any loan from the bank. (*q*) So, where one partner sells *478 *goods belonging to the firm (*r*), or does work (*s*) of the kind he and his co-partners undertake an action for payment may be maintained by him and them jointly, although the person to whom the goods were sold, or for whom the work was done, knew nothing of the other partners. In Cooke *v.* Seeley (*t*) a partner had an account at a bank in his own name, but there was evidence to show that it was a partnership account, and was known to the bankers to be so, and under these circumstances it was held that all the partners were entitled to sue the bankers for dishonoring a cheque drawn on them by the one partner for partnership purposes.

Cooke v. Seeley.

It follows from the principle on which these cases were decided, and although formerly doubted (*u*), it is now clearly established, that dormant partners may join as plaintiffs in an action on a contract entered into on behalf of the firm of which they are members. (*v*)

Dormant partners.

But a dormant partner never *need* be joined as a co-plaintiff in an action on a contract entered into with the firm or with one of its members. (*x*) [1]

Dormant partner.

Nominal partners, *i. e.*, persons who are not entitled to share the profits of the firm, but whose names appear and are used as if they were, never need join as plaintiffs in an action on an ordinary contract not under seal. (*y*) If a partner retires, and leaves his name in the firm, it is not necessary that he should be a co-plaintiff in an action brought by the continuing partners in respect to what has happened since the retirement. (*z*)

Position of nominal partners.

(*q*) Alexander *v.* Barker, 2 Cr. & J. 133; Sims *v.* Britain, 4 B. & A. 375, and Sims *v.* Bond, 5 ib. 389.

(*r*) Skinner *v.* Stocks, 4 B. & A. 437.

(*s*) Townsend *v.* Neale, 2 Camp. 189; Arden *v.* Tucker, 4 B. & Ad. 817.

(*t*) 2 Ex. 746.

(*u*) See Mawman *v.* Gillett, 2 Taunt. 325; Lloyd *v.* Archbowle, ib. 324.

(*v*) Cothay *v.* Fennell, 10 B. & C. 671. See, also, *ante*, notes (*o*) and (*p*); Robson *v.* Drummond, 2 B. & Ad. 303, *per* Littledale, J.

(*x*) Leveck *v.* Shafto, 2 Esp. 468, action for work and labor. See Phelps *v.* Lyle, 10 A. & E. 113, as to contracts with the "directors" of a company.

[1] See *ante*, 467, note.

(*y*) Kell *v.* Nainby, 10 B. & C. 20. See, also, Spurr *v.* Cass, L. R. 5 Q. B. 656, where the contract was in writing and with the nominal partner.

(*z*) Cox *v.* Hubbard, 4 C. B. 317.

But if a nominal partner's name is on a bill of exchange or promissory note, he ought to be a party to the action brought *upon it; and the same rule *479 applies to actions on contracts under seal. (a) Where nominal partners must sue.

One partner may sue alone on a written contract made with himself if it does not appear from the contract itself that he was acting as agent of the firm (b); and one partner ought to sue alone on a contract entered into with himself, if such contract is to be regarded as made with him as a principal, and not on behalf of himself and others. Therefore, if each of several partners lends money out of his own funds, each must sue alone for repayment of his advance, although the loans may have been made in pursuance of some arrangement with all the partners; for each loan creates a separate debt to each partner, and the several loans do not together form one debt to the firm. (c) Again, if one partner alone holds a certain office and does work in his official capacity, he alone ought to sue for payment of the work so done. (d) Again, if a partner enters into a contract under seal for the payment of money, and the money is paid out of the funds of the firm, and it then appears that the contract was invalid on the ground of fraud, the partner who entered into the covenant may sue alone for the recovery back of the money. (e) Lastly, if one partner acting for the firm has represented himself to be acting on his own account only, and has ostensibly entered into a contract on his own account, he alone ought to sue on it. (f) Actions by one partner. Covenant with one partner.

The Judicature acts and the rules promulgated under them have rendered it comparatively unimportant to consider whether *in any given case all partners who can sue must *480

(a) Guidon v. Robinson, 2 Camp. 302.

(b) See Skinner v. Stocks, 4 B. & A. 437, and Cothay v. Fennell, 10 B. & C. 671. See, also, Cawthron v. Trickett, 15 C. B. N. S. 754, as to actions by a master and part owner of a ship, on bills of lading, and Ajacio v. Forbes, 14 Moo. P. C. 160, in the privy council, where it was held that one partner might maintain an action upon an agreement in writing made with him alone, although the agreement related to the business of the firm, and was, in truth, for its benefit, and the consideration was a release by the partner in question of a debt due to the firm.

(c) See Thacker v. Shepherd, 2 Chitty, 652; Brand v. Boulcott, 3 Bos. & P. 235.

(d) Brandon v. Hubbard, 2 Brod. & Bing. 11.

(e) Lefevre v. Boyle, 3 B. & Ad. 877.

(f) Lucas v. De la Cour, 1 M. & S. 248.

do so, and whether an action should be brought in the name of one partner or of all; for mistakes on such matters are no longer fatal to an action. At the same time mistakes create delay and expense, and attention ought therefore still to be paid to the points above adverted to; and if all the members of a firm sue when one only ought to do so, or one only sues when all ought to do so, and the defendant can show that he is thereby prejudiced, he can apply to have the improper parties struck out or the proper parties joined, as the case may be. (*g*)

Actions ex delicto.

Actions by partners for torts.

With respect to actions by partners not founded on any breach of contract, or of *quasi* contract, but on some tort, the general principle is that where a joint damage accrues to several persons from a tort, they ought all to join in an action founded upon it (*h*);[1] whilst on the other hand several persons ought not to join in an action *ex delicto*, unless they can show a joint damage. (*i*)

Actions for libel.

These doctrines are well illustrated by actions for libel. A libel can clearly be made the subject of an action in the name of all the partners, if the firm has been damnified (*j*); and if the libel reflects directly on one partner, and through him on the firm, two actions will lie, viz: one by the party libeled, and the other by him and his co-partners (*k*); but the damage in the first action must not appear to be joint, nor must that in the second appear to be confined to the libeled partner only. (*l*) If one partner is libeled, and the firm cannot be shown to have been damnified, an action for the libel should be brought in the name of the individual partner aggrieved, and not by the *481 *firm (*m*); and he may sue alone, although the libel more

(*g*) See Ord. xvi. rule 13.

(*h*) See 1 Wms. Saund. 291, *m*; Addison *v.* Overend, 6 T. R. 766; Sedgworth *v.* Overend, 7 T. R. 279.

[1] See *ante*, 467, note.

(*i*) 2 Wms. Saund. 116, *a*.

(*j*) See Cooke *v.* Batchelor, 3 Bos. & P. 150; Forster *v.* Lawson, 3 Bing. 452; Williams *v.* Beaumont, 10 Bing. 260: The Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 87.

(*k*) The two actions can now be combined in one. See Ord. xvii. r. 6.

(*l*) See Harris *v.* Bevington, 8 C. & P. 708; and Forster *v.* Lawson, 3 Bing. 452; 2 Wms. Saund. 117, *b*; Haythorne *v.* Lawson, 3 C. & P. 196.

(*m*) Solomon *v.* Medex, 1 Stark. 191.

particularly affects him in the way of his business. (*n*) Moreover, a general statement not clearly pointing to any particular person, but libelous as to an entire class, may be treated by any individual of that class, who can show that he was in fact intended, as a libel on himself; and this principle is as applicable to libels affecting a firm as to those affecting single individuals. (*o*)

Consequence of non-joinder of partners.

All the members of a firm ought to join in an action for the recovery of goods of the firm, or for damages for their loss or injury (*p*)[1]; but if one only sues he will be entitled to recover damages in respect of his interest in the goods (*p*); and if, after he has done so, another action is brought by one of his co-partners, that action cannot be stopped. (*q*)

Actions where one partner colludes with defendant.

If a person colludes with one partner in a firm to injure the other partners, the latter can jointly sustain an action against such person. Thus, where the bankers of a firm of four partners knew that one of them was in the habit of drawing bills in the name of the firm for his own private purposes, and the bankers colluded with him and kept his co-partners in ignorance of what was going forward, and paid the bills when due out of the funds standing to the credit of the firm, it was held that an action lay against the bankers at the suit of the other three partners. (*r*)

Actions of ejectment.

An action of ejectment for the recovery of real property belonging to the firm ought to be brought in the names of all those persons in whom the legal estate is vested. (*s*) If, however, one partner only has made a lease of the partnership property, then as his title cannot be disputed by the lessee, notice to quit may be given and ejectment maintained by the lessor alone; and if he alone has the legal estate, the circumstances that rent has been paid to the firm, and *receipts for it have been given by all the partners, will not affect his right to give the notice and bring the action in his own name. (*t*) *482

(*n*) Harris *v.* Bevington, 8 C. & P. 708; Robinson *v.* Marchant, 7 Q. B. 918.

(*o*) Le Fanu *v.* Malcolmson, 1 H. L. C. 637.

(*p*) See Addison *v.* Overend, 6 T. R. 766; Bleadon *v.* Hancock, 4 Car. & P. 152. See Dockway v. Dickenson, Comb. 366.

[1] See *ante*, 467, note.

(*q*) Sedgworth *v.* Overend, 7 T. R. 279.

(*r*) Longman *v.* Pole, Moo. & Mal. 223.

(*s*) See 1 Chitty on Plead. 74.

(*t*) See Doe *v.* Baker, 2 B. Moore, 189.

(b.) *Actions against the firm.*

Actions against partners.

In considering who ought to be sued in respect of a breach of contract committed by a firm, or some or one of its members, regard must be had in the first instance to the persons upon whom that contract is legally binding. This matter has been already discussed at length in the first and second chapters of the present book, and it is needless to repeat what has there been said. Assuming, therefore, the question of liability to be determined, it remains only to consider whether all the persons who are liable ought to be sued jointly, or whether any and which of them may be sued without the others. If there is any doubt on this question the proper way is to sue them all; for this is now expressly authorized to be done. (*u*) In order, however, to save expense, the following rules will be found useful:

Actions ex contractu.

Actions against partners on contracts.

All persons who are jointly liable on a contract ought to be sued jointly (*x*)[1] unless some of them are abroad. (*y*) This rule applies to actions against partners for the recovery

(*u*) Ord. xvi. rr. 1, 3, 5. Honduras Rail. Co. *v.* Tucker, 2 Ex. D. 301. See, also, Ord. xix. r. 13, abolishing pleas in abatement.

(*x*) See the note to Cabell *v.* Vaughan, 1 Wms. Saund. 291 *b*; Byers *v.* Dobey, 1 H. Blacks, 236; Bonfield *v.* Smith, 12 M. & W. 405.

(*y*) See 3 & 4 Wm. 4, c. 42, § 8; Jolly *v.* Lord Curzon, 4 C. B. 249. See before this statute, Sheppard *v.* Baillie 6 T. R. 327.

[1] Any matter which constitutes a defense as to one partner, where the firm is sued jointly upon a contract will, in general, be good for all the defendants. See Cooley *v.* Sears, 25 Ill. 501; Gribbin *v.* Thompson, 28 Ill. 61, and cases there cited. The personal defense of infancy, referred to in the text, is an exception to this rule.

To a joint declaration against partners, a plea, by one, that they did not promise within five years, is a good plea. Vallandingham *v.* Duval, 7 J. J. Marsh. 262.

In a suit upon a co-partnership note, either member of the firm, if the note is tainted with usury, may set up that fact in defense, without the consent of the other members; and one member who has purchased the interest of the others, assuming the partnership debts, and has renewed the note tainted with usury, by the execution of a new one in his own name, may set up this defense. But otherwise as to a third party assuming payment of a note thus tainted. Machinists' Bank *v.* Krum, 15 Iowa, 49.

G. and O. were partners in the purchase with warranty of a threshing machine, for which they executed their

of penalties imposed upon them by statute (*z*), and to actions in form *ex delicto*, but founded in substance on a breach of contract

promissory note. In an action on the note, where O. made default: *Held*, th t G. alone could plead in defense the breach of the contract of the warranty. Brayley *v.* Goff, 40 Iowa, 76.

In some of the States it is not necessary to join all the partners as defendants. See McCulloch *v.* Judd, 20 Ala. 703; Hicks *v.* Maness, 19 Ark. 701; Johnson *v.* Byrd, 1 Hempst. 434; Hamilton *v.* Buxton, 6 Ark. 24; Burgen *v.* Dwinal, 11 Ark. 314; Hicks *v.* Branton, 21 Ark. 186; Kent *v.* Wells, id. 411; Yates *v.* Watson, 54 Mo. 585; Ryerson *v.* Hendrie, 22 Iowa, 480; Williams *v.* Rogers, 14 Bush, 777. See, also, Green *v.* Pyne, 1 Ala. 235.

So, where several are sued as co-partners, the plaintiff may discontinue at any time as to such, if any, as are not partners. Wheeler *v.* Bullard, 6 Port. 352; Guzzan *v.* Bebee, 8 Port. 49.

If all the partners made defendants in an action have not been served with process, the plaintiff may discontinue against those not served. Clark *v.* Stoddard, 3 Ala. 366; Earbee *v.* Evans, 9 Port. 295.

So, in some of the States, judgment may be rendered against less than the whole number sued. White *v.* Tudor, 32 Tex. 758; Finney *v.* Allen, 7 Mo. 416; Williams *v.* Rogers, 14 Bush, 777; Dean *v.* Savage, 28 Conn. 359; Miles *v.* Von Deyn, 6 N. W. Rep. 39.

So, where the holder of a promissory note signed with the firm names of two different partnership firms, sues several individuals as members of said firms, and where it appears upon the trial that one of the individuals sued is not liable because he is not a member of either firm, and where it also appears that another of said individuals is not liable, because the person who signed the firm name of one of the firms had no authority to so sign the same, nor any authority to bind this individual, the plaintiff may dismiss his action against those two defendants who are not liable, and take judgment against those who are shown to be liable. Silvers *v.* Foster, 9 Kan. 56.

Where, in an action against partners upon a partnership obligation, separate judgments are entered against each of the defendants, instead of a joint judgment against all, this is an irregularity merely; and the court has no power to set aside the judgments on motion, unless motion is made within one year after their rendition. Judd *v.* Hubbell, 76 N. Y. 543.

Under the Code, in an action against three as partners, judgment may go against the two who alone were served and appeared, upon proof that they alone composed the firm. Pruyn *v.* Black, 21 N. Y. 300.

Where, in an action against three defendants, sought to be charged as partners, only one appears and defends, and there is evidence of his liability, the objection cannot be maintained that there is not sufficient evidence of the liability of the other defendants; because, if they were not served with process, a judgment world not affect them, and if they were served with process, and failed to appear, their default is an admission of their liability. Van Eps *v.* Dillaye, 6 Barb. 244.

In a suit against several partners, some of whom have not appeared, if the plaintiff declare against all, he may, after verdict agaist those who have appeared, have judgment against those who have not. Taylor *v.* Henderson, 17 Serg. & R. 453.

Where three defendants, partners,

(*z*) Bristowe *v.* James, 7 T. R. 257.

express or implied (*a*); but it is subject to certain real or apparent exceptions which require notice.

have been served with process, and one has pleaded, judgment against him is erroneous, without first taking an interlocutory judgment against the other two. Nelson *v.* Lloyd, 9 Watts, 22.

In a suit against partners, if one of them shows that the name of the firm was put to it without his authority, and that the debt was not a firm debt, and he is discharged by the jury, judgments may be entered for him and against his partner. And in such a case the holder of the note may bring a several suit against the partner liable and recover a several judgment. Parker *v.* Jackson, 16 Barb. 33.

On a firm note, in terms promising jointly and severally, the partner who signed the firm name may be sued alone. Snow *v.* Howard, 35 Barb. 55. See, also, Ryerson *v.* Hendrie, *supra*.

Where one partner makes a warranty on the sale of goods, an action may be maintained on the warranty against that parner, without joining the other. Clarke *v.* Holmes, 3 Johns. 148; Cookingham *v.* Lasher, 38 Barb. 656.

If one of several partners promise, individually, to pay a debt, he will not be allowed to show that it was due jointly from himself and co-partners, Conley *v.* Good, Breese, 96.

A partner dealing in the name of his firm was inquired of by the party with whom he dealt, of what persons the firm consisted, and replied, of himself and another, whose names he gave in writing. In a suit against the two as partners, they pleaded that there was another partner not joined, and the promises alleged were made by the three jointly. Upon issue joined, the defendants were *held* to be estopped to prove the partnership to consist of three. Chase *v.* Deming, 42 N. H. 274.

Where, after dissolution of a commercial firm, holding a lease of premises with the privilege of renewal, one partner claims the right of renewal; the other partner, bound *in solido*, need not be made a party in an action to expel him. Geheebe *v.* Stanby, 1 La. Ann. 17.

A complaint against a member of a co-partnership alleged, that, at the request of the defendant, the plaintiff had rendered services of a certain value in the settlement of the partnership; that such co-partnership had been dissolved, and the final settlement of the partnership business placed in the hands of the defendant, pursuant to a written agreement of dissolution, made part of the complaint by copy, whereby the defendant had agreed to pay off the partnership debts, upon realizing sufficient means out of the partnership assets; and that sufficient had been realized by the defendant out of such assets, to pay all of the partnership debts: *Held*, on demurrer, for a defect of parties defendant, that such exhibit forms no part of the complaint, and cannot be looked to in determining the demurrer, that the complaint discloses a good cause of action against the defendants alone, and that the other member of the co-partnership is not a necessary party defendant. Way *v.* Fravel, 61 Ind. 162.

In an action against a partnership of B., W. & Co., W. appeared and pleaded *non assumpsit*. Afterwards B., against whom the suit had been abated, entered his appearance, and without filing any plea, entered into the trial and defended the suit: *Held*, that a judgment against B. and W. only was not erroneous, as they did not discover, by a plea in abatement, that there were other partners, and as B., by appearing and going to trial without a separate

(*a*) Powell *v.* Layton, 2 Bos. & P. N. R. 365; Luddle *v.* Willson, 6 T. R. 369.

In the first place an infant partner, not being bound by any *contract entered into by or on behalf of the firm, ought not to be joined as a defendant in an action on any such contract. (*b*)[1] *483 Actions against infant partners.

Secondly, as regards dormant partners. It has been seen that they are liable on all contracts entered into on behalf of the firm to which they belong, and whether such a contract is written or unwritten, express or implied, it is clear that a dormant partner may be sued upon it. (*c*) Dormant partners, Actions against dormant partners.

plea, had bound himself to abide by the plea of his other partnre. Barnet *v.* Watson, 1 Wash. (Va.) 372.

(*b*) See 1 Wms. Saund. 207, *a*; Chandler *v.* Danks, 3 Esp. 76; Burgess *v.* Merrill, 4 Taunt. 468; Jaffray *v.* Trebain, 5 Esp. 47. Formerly it was thought that an infant partner ought to be made a co-defendant. See *Ex parte* Henderson, 4 Ves. 164; Gibbs *v.* Merrill, 3 Taunt. 307.

[1] In Burgess *v.* Merrill, cited by the author, infancy was held to be a good replication to a plea of non-joinder of an infant partner as defendant; but the case of Burgess *v.* Merrill has not been followed in this country. Here, where one of several defendants in an action of assumpsit pleads his infancy and gives it in evidence upon the trial, the jury may find a verdict for the infant, and for the plaintiff against the other defendants; and judgment may properly be rendered on such verdict. Cutts *v.* Gordon, 13 Me. 474; Hartness *v.* Thompson, 5 John. 160; Woodward *v.* Newhall, 1 Pick. 500; Tuttle *v.* Cooper, 10 Pick. 281; Barlow *v.* Wiley, 3 A. K. Marsh. 457; Allen *v.* Butler, 9 Vt. 126; Cole *v.* Pennell, 2 Rand. 179; Wamsley *v.* Lindenberger, id. 478.

In such a case the plaintiff may enter a *nolle prosequi* against the infant, and proceed to judgment against the other defendants. See Woodward *v.* Newhall, *sup.;* Kirby *v.* Cannon, 9 Ind. 371; Mason *v.* Dennison, 15 Wend. 66; *Ex parte* Nelson, 1 Cow. 417.

Where in an action on a contract the defendant pleads the non-joinder of his co-partner as defendant, a reply that such co-partner is an infant is bad on demurrer. Slocum v. Hooker, 13 Barb. 536. See, generally, upon this subject Ewell's Lead. Cases, 243, 244.

In an action against a firm for a partnership debt, judgment was rendered in favor of two of the firm, on the ground that the debt was contracted during their infancy, and against the remaining adult member: *Held*, that the moneys and property of the firm were applicable toward the payment of the last mentioned judgment. Whittemore *v.* Eliott, 14 N. Y. Supreme Ct. 518.

In an action upon the obligation of a firm, contracted while one of the members was a *feme sole*, but who had since married: *Held*, that her husband was properly joined as a party defendant. Keller *v.* Hicks 22 Cal. 457.

(*c*) Robinson *v.* Wilkinson, 3 Price, 538; Beckham *v.* Drake, 9 M. & W. 79, and 11 ib. 315, overruling Beckham *v.* Knight, 4 Bing. N. C. 234, and see *ante*, p. 338. Of course if a person is sued on the ground that he is a dormant partner, that fact must be proved, for otherwise no case will be made against him. See Hall *v.* Bainbridge, 8 Dowl. 583.

morever, ought to be made co-defendents in an action on a contract binding the firm. (*d*)[1] But a person who holds himself out to another, as the only person with whom that other is dealing, cannot be allowed afterwards to say that such other was also dealing with somebody else. (*e*)[2]

(*d*) See Bonfield *v.* Smith, 12 M. & W. 405; Dubois *v.* Ludert, 5 Taunt. 609, where it was held that a dormant partner ought to be joined.

[1] In actions *ex contractu* against a partnership, all the ostensible and public members of the co-partnership existing at the time of the making of the contract sued on must be joined as defendants; but dormant or secret partners need not be joined. Page *v.* Brant, 18 Ill. 37; Mitchell *v.* Dale, 2 Har. & G. 159; Jackson *v.* Alexander, 8 Tex. 109.

Where a firm consisting of three members, B, A and M., did business under the firm name of "B & A," and everything in the apparent mode of transacting their business indicated that B and A constituted the sole members of the firm; and there was nothing to signify to ordinary dealers with the firm that M. had anything to do with it; and there was an entire omission on the part of B and A to communicate the fact of such connection to one dealing with them; and actual ignorance by him of such connection, and apparent good faith on his part in treating B and A as the only parties interested: *Held*, that the referee was right in regarding M. as a dormant partner, and therefore not necessary to be joined as a co-defendant with B and A. North *v.* Bloss, 30 N. Y. 374.

A party suing a firm upon an agreement made by them need not join a member of that firm, if he did not know when the agreement was made that there was such a partner, and there was nothing in the style of the firm to indicate that there was any other partner than those whose names appeared, and he had no notice of such a partner. Hurlbut *v.* Post, 1 Bosw. 28; Brown *v.* Birdsall, 29 Barb. 549. See, also, Farwell *v.* Davis, 66 Barb. 73.

Although a partnership may be open and notorious in the immediate neighborhood of the place of business of the firm, yet, if its existence be not known to the plaintiff, and one member of the firm make the contract with the plaintiff in his own name, and credit be, upon reasonable grounds, given by the plaintiff to him alone, an action upon the contract may be sustained against him, without joining his co-partners as defendants. Hagar *v.* Stone, 20 Vt. 106; Cleveland *v.* Woodward, 15 Vt. 302; Blin *v.* Pierce, 20 Vt. 25. See, also, Farwell *v.* Davis, *supra*.

In assumpsit for goods sold and delivered, the plaintiff need not join a merely nominal partner of the purchaser, as a defendant. Hatch *v.* Wood, 43 N. H. 633.

Under the Code, suits for debts of a limited partnership may be brought against the general partners only, and a levy in pursuance thereof on firm property binds the interests of all the partners. Artisan's Bank *v.* Treadwell 34 Barb. 553.

(*e*) See De Mautort *v.* Saunders, 1 B. and Ad. 398; Stansfeld *v.* Levy, 3 Stark. 8. Whether a defendent has so held himself out is a question for the jury. Compare the cases in the last note.

[2] Where one or more of several defendants, sued as partners, answered, denying that they were members of the firm, or indebted to the plaintiff on the cause of action stated in the petition, and on

If, therefore, a person carries on business in his own name, and incurs debts in so doing, he may be properly sued alone for such debts. (*f*) The same rule holds whenever a partner enters into a written contract in which he does not disclose the fact that he is acting for other people; for although they may be sued, he cannot insist that they shall be sued. (*g*)

One partner liable if others are not disclosed.

Thirdly, to the general rule that all persons jointly liable on a contract ought to be sued jointly, there are a few statutory exceptions. Thus, by the Carriers act a person sued as a comon carrier, and not on any special agreement, cannot *require his co-partners to be joined (*h*); and by the *484 Companies act, 1862, members of a registered company, who know that he has carried on business for more than six months, with less than seven members, are severally liable for the debts of the company contracted after such six months, and cannot require the other members to be joined. (*i*)

Statutory exceptions to general rule.

With respect to joint and several contracts, the rule now is that all persons liable on them may be sued jointly or separately, or in the alternative in one action. (*j*)

Actions on joint and several contracts.

The previous remarks have been addressed to the case of actions on contracts binding the firm. But a contract may be entered into by a partner and not bind the firm, either because it was not entered into on behalf of the firm, or because if it was, the partner entering into it exceeded his au-

Actions on contracts not binding on firm.

the trial of this issue the jury returned a generel verdict for the plaintiff, and also found specially, under the direction of the court, that the defendants so answering were not, in fact, members of the firm, but had held themselves out as partners, and that the plaintiff had dealt with and trusted them accordingly: *Held*, that such special finding was not inconsistent with the general verdict. and that judgment was properly entered thereon for the plaintiff. Reber *v.* Columbus, etc. Co. 12 Ohio St. 175.

(*f*) See, in addition to the cases cited in the last note, Mullett *v.* Hook, Moo. & Mal. 88; Baldney *v.* Ritchie, 1 Stark. 338; Doo *v.* Chippenden, Abbott on Shipping, 84; Colson *v.* Selby, 1 Esp. 452. Dubois *v.* Ludert, 5 Taunt. 609, is the other way, but cannot, it is conceived be supported.

(*g*) See Higgins *v.* Senior, 8 M. & W. 834, where the plaintiff knew the defendent was acting as agent.

(*h*) 11 Geo. 4 & 1 Will. 4, c. 68, §§ 5, 6.

(*i*) 25 & 26 Vict. c. 89, § 48.

(*j*) Ord. xvi. rr. 1, 3, and 5. See, as to the old law, the note to Cabell *v.* Vaughan, 1 Wms. Saund. 291, *g;* and as to staying one action, when the creditor has been satisfied in another, see Carne *v.* Legh, 6 B. & C. 124; Nesbitt *v.* Howe, 8 Ir. Law Rep. 273.

thority express and implied. In such cases the old rule was that the partner contracting, and no one else, ought to be sued. If he contracted as a principal, he ought to be sued on the contract; whilst if he contracted as an agent, he ought to be sued as having done so without authority. (*k*) If a partner entered into a contract on behalf of the firm, but exceeded his authority, and the contract did not bind the firm, and the firm repudiated it, the partner contracting, and not the firm, ought to have been sued for money paid to him under it, and sought to be recovered back. (*l*) But now in cases of this description, whenever there is any doubt as to who ought to be sued, the proper way is to sue all the partners, and so to frame the statement of claim as to be able to obtain judgment against the right persons according to the evidence on the trial. (*m*)

*485 **Actions ex delicto*

Actions of tort against partners.

It is not every tort which, though committed by several persons acting together, is legally imputable to them all jointly (*n*); but supposing a tort to be imputable to a firm, an action in respect of it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants (*o*), and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself. (*p*) But there is a distinction between ordinary actions of tort and those which are brought against persons in respect of their common interest in land; for all joint tenants in common ought to be joined in an action for an injury arising from the state of their land (*q*); and this rule applies to partners as well as to persons who are not partners.

(*k*) See Lewis *v.* Nicholson, 18 Q. B. 503, and that class of cases noticed *ante*, pp. 366, 367.

(*l*) See Hudson *v.* Robinson, 4 M & S. 475.

(*m*) See Ord. xvi. r. 1. Honduras Rail. Co. *v.* Tucker, 2 Ex. D. 301.

(*n*) See 2 Wms. Saund. 117, *b* and *c*; 1 Chitty, Plead. 96–7.

(*o*) Sutton *v.* Clarke, 6 Taunt. 29.

(*p*) Mitchell *v.* Tarbutt, 5 T. R. 649; Ansell *v.* Waterhouse, 6 M. & S. 385.

(*q*) 1 Wms. Saund. 291, *f* and *g*, and Mitchell *v.* Tarbutt, 5 T. R. 649.

B. *Actions in respect of equitable rights.*

Parties to actions in the Chancery Division.

Actions by and against partnerships for the specific performance or the rescission of contracts, for taking agency accounts, as well as in respect of frauds, breaches of trust, and other matters, are by no means unusual; and an action by a creditor of a firm to obtain payment out of the estate of a deceased partner, is a matter of almost daily occurrence. (*r*)

As a general rule, an action in the Chancery Division by or against an ordinary partnership will be defective for want of parties, unless all the partners are before the Court.[1] But it was early held,

(*r*) See, on this subject, book iv, ch. 1.

[1] See, generally, *post*, 877 *et seq.*

Where a debt due a partnership is assigned to one of the partners, all the partners must be joined in a bill to recover the debt. Gaither *v.* Caldwell, 1 Dev. & B. Eq. 504; Russell *v.* Swann, 16 Mass. 314.

An account in favor of a partnership is not matter to support a bill brought by one of the partners only, where it does not appear on the face of the bill that the other partner is dead, or has parted with his interest. Such an account constitutes no cause of action in favor of the complainant, and there can be no decree thereon. Frost *v.* Schackleford, 57 Ga. 260.

A person who was a member of a partnership when a mortgage was given to the firm (but in the name of one partner only), and also when advances were afterwards made thereon by the firm, and when the bill was filed, ought to be a party to a suit for its foreclosure. DeGreiff *v.* Wilson, 30 N. J. Eq. 435.

To a bill against a partnership after the death of a part of the members, the representatives of such as have deceased ought to be parties. Carter *v.* Currie, 5 Call, 158.

In an action by a third person against partners for an account, if one of the defendants dies pending the suit, his representatives must be made parties, unless it is shown that there are no firm assets, or that they are insufficient to pay the debts of the concern, so that such representatives would have no interest in the partnership effects. Pearce *v.* Bruce, 38 Ga. 444.

In a suit against the surviving partner, to subject firm assets, the administrator of the deceased partner is not a necessary party to the proceedings, where the object is solely to reach the property of the firm. If the suit is to subject the individual property of the partners, then the administrator of the deceased partner is a necessary party. Robertshaw *v.* Hanway, 52 Miss. 713.

A person who has covenanted with the survivors of a partnership to stand in the place of a deceased partner and to satisfy his demands upon the firm, cannot, in a suit to settle the partnership affairs, object that the representatives of the deceased should have been parties. Waugh *v.* Mitchell, 1 Dev. & B. Eq. 510.

Where the surviving partner of an insolvent firm assigned certain lots belonging to the firm for the benefit of its creditors, the heirs of the deceased partner cannot be made parties to a suit involving the title to the lots, on

that where some partners are abroad, a suit against those who remain may be prosecuted with effect, and a decree be obtained against them for payment of the whole of the amount due from the firm. (*s*)

All the members of a firm ought to be parties to an action *486 *for a general account (*t*); and in an action for payment of a partnership debt out of the assets of a deceased partner, the surviving partners ought to be parties. (*u*) But if the ground of action is fraud it is not necessary to join a partner not implicated in it and not sought to be made liable. (*v*) [1]

Actions against agents.

An agent of the firm may be sued for an account by all the partners, although he only knew of one of them, and was employed by and has transacted business with that one alone. (*x*) At the same time, an agent is only liable to account to his principal; and therefore if a person has been employed by one partner only as principal, or has been induced by that partner to believe that he alone was the principal, in such a case the other partners have no right to call the person so employed to account with them. (*y*) On the other hand, if a person has throughout dealt with some partners only, and has all along treated them as principals, he can be compelled by them to account, and he cannot successfully insist that the other partners ought to be parties to the action. (*z*)

the ground of any relation of trust or confidence subsisting between them and the assignee. Rothwell *v.* Dewees, 2 Black, 613.

(*s*) See Darwent *v.* Walton, 2 Atk. 510; Cowslad *v.* Cely, Prec. in Chanc. 83; and see Orr *v.* Chase, 1 Mer. 729.

(*t*) Coppard *v.* Allen, 2 DeG. J. & S. 173.

(*u*) Cox *v.* Stephens, 9 Jur. N. S. 1144, V.-C. K.; Hills *v.* M'Rae, 9 Ha. 297. See, also, *infra*, book iv. ch. 1, § 2.

(*v*) See Plumer *v.* Gregory, 18 Eq. 621; Atkinson *v.* Mackreth, 2 Eq. 570.

[1] Where one assumes to act as agent for one member of a firm in the sale of property of the firm, and his action is ratified by the assumed principal by the receipt of the money paid on the sale, the purchaser being ignorant of the existence of the partnership, in an action to recover back the money paid, for fraud on the part of the agent, or for mistake, the other partners are not necessary parties. The division of the money by the declared principal among persons who were strangers to the plaintiff in the transaction, does not affect his liability. Lealie *v.* Wiley, 47 N. Y. 649.

(*x*) See Killock *v.* Greg, 4 Russ. 285; *Anon.* Godb. 90.

(*y*) See Killock *v.* Greg, 4 Russ. 285; Maxwell *v.* Greig, 1 Coop. Ca. in Ch. 491.

(*z*) Benson *v.* Hadfield, 4 Ha. 32; and see Aspinall *v.* The London and N.-W. Rail. Co. 11 Ha. 325.

A surviving partner may sue an agent of the firm for an account without making the executors of the deceased partner parties (*a*); for the surviving partners are the proper persons to get in and give receipts for debts owing to the firm. (*b*)

Actions by surviving partner.

2. *Actions by and against partners where a change in the firm has occurred.*

In the preceding remarks upon the persons who ought to sue and be sued when a right is sought to be enforced by or against a firm, it has been assumed that no change in the members of the firm has occurred between the period when the right in *question accrued and the time when the action to enforce it is brought. It is proposed now to consider to what extent the rules above established require modification, when some such change has taken place by reason either of the introduction of a new partner, or of the retirement, death, or bankruptcy of an old one.

Effect of change in firm on actions by and against it.

*487

First, with respect to changes caused by the introduction of new partners and the retirement of old ones.

By § 25, c. 6 of the Judicature act, 1873, debts may now be assigned by writing and notice to the debtor so as to entitle the assignee to sue for them in his own name. Consequently, if on the introduction of a new partner or the retirement of an old partner the debts due to the old firm are thus assigned to the new firm, the new firm can sue in respect of them, either in its mercantile name or in the names of its members. Again, a new partner may, it is apprehended, always be joined in an action to recover a debt or enforce a demand in which he has an interest, provided his joinder does not prejudice the rights of the defendants. Further, if an incoming partner has agreed with his co-partners to take upon himself the debts and liabilities of the old firm, they can require him to be made a defendant for their own partial indemnity (*c*); and it is apprehended that in a case of this kind an incoming partner can be properly sued with the other partners in the first instance, although care must be taken in entering judgment against him.

Alterations made by Judicature acts.

(*a*) Haig *v.* Gray, 3 DeG. & Sm. 741. Brasier *v.* Hudson, 9 Sim. 1.
(*b*) See Philips *v.* Philips, 3 Ha. 281; (*c*) Ord. xvi. rr. 17, 18.

When new partner can be sued.

Except, however, in these cases an incoming partner can neither sue nor be sued in respect of a liability of the old firm, unless there is some agreement express or implied between himself and the person suing him or being sued by him. (*d*)[1]

As regards negotiable instruments, indeed, any persons who can agree to sue jointly upon them may do so, provided the instrument is in such a state as to pass by delivery; therefore, if a bill *488 or note, indorsed in blank, is given to a firm *consisting of certain individuals, who afterwards take in a new partner, they and he, or some or one of them, may sue on that bill or note. (*e*)

So, as regards changes occasioned by the retirement of a partner.

Effect of retirement of old partner.

It has been already shown, that the retirement of a partner in no way affects his rights against or obligations to strangers in respect of past transactions.[1] Subject, therefore, to the above observations, a retired partner ought to join as a plaintiff, and be joined as a defendant, in every action to which, had he not retired, he would have been a necessary party. This rule holds good, even where a contract is entered into before, and the breach of it occurs after the retirement of a partner. (*f*)[2] In one case, indeed, it was held at Nisi Prius that where two partners sold goods, and they afterwards dissolved partnership, an action for the price of those goods was sustainable by the one partner who

(*d*) See, accordingly, Wilsford *v.* Wood, 1 Esp. 182; Ord *v.* Portal, 3 Camp. 239, note; Waters *v.* Paynter, Chitty on Bills, 406, note 5, ed. 10; Vere *v.* Ashby, 10 B. & C. 288; Young *v.* Hunter, 4 Taunt. 582. See Radenhurst *v.* Bates, 3 Bing. 463.

[1] See ante, 392, and note.

(*e*) See Ord *v.* Portal, 3 Camp. 239, and *ante*, p. 476.

[1] The dissolution of a firm by agreement between the members thereof will not affect the rights of its creditors, though the terms of such dissolution will frequently be enforced by the courts, as between the parties to such agreement. Hudgins *v.* Lane, 11 Bankr. Reg. 462. Pending a suit for dissolution, and until the decree, partnership creditors may pursue their remedies at law to gain priority. Adams *v.* Woods, 8 Cal. 152. See, also, Naglee *v.* Minturn, 8 Cal. 540; Adams *v.* Woods, 9 Cal. 24.

See *ante*, 417, and notes.

(*f*) See Dobbin *v.* Foster, 1 Car. & K. 323.

[2] In 1843, A, B and C were partners, doing business under the firm of A, B & Co. In 1844, A and C formed a partnership under the firm of A & C. The latter firm were sued, as the firm of A & C, for a debt contracted by the former firm: *Held*, that A and C were liable only in a suit against the former firm. Fagely *v.* Bellas, 17 Pa. St. 67.

continued to carry on the business of the late firm (*g*); but the propriety of this decision is more than questionable. Whether, however, it is now necessary to join as a plaintiff a retired partner against whom the defendant has no claim, and who has no beneficial interest in what is sought to be recovered admits of some doubt.

Sometimes one partner retires and a new partner comes in, and an agent of the firm, in ignorance of the change which has occurred, enters into a contract on behalf of the old firm; in such a case it seems that the members of the new firm may adopt the contract and sue on it, unless the defendant is prejudiced by their so doing. (*h*)

Fresh contract.

And a new firm may sue or be sued in respect of a fresh contract entered into by or with it to pay a debt owing to or by an old firm.[1] Thus, where A. was indebted to B., and afterwards C. entered into partnership with B., and A. contracted a further debt with both, and then settled an account with both, as well upon what was due to B. before his partnership with C., as upon the debt contracted afterwards, it was held that B. and *C. might join in an action of assumpsit on an account *489 stated, and recover the whole debt. (*i*)

Change in firm may prevent it from suing.

Although a change in a firm, whether by the introduction of a new partner or the retirement of an old one, cannot, except as already mentioned, confer upon the partners any new right of action against strangers, or *vice versâ*, as regards what may have occurred before the change took place, it may, nevertheless, operate so as to discharge a person from a contract

(*g*) Atkinson *v.* Laing. Dowl. & Ry. N. P. Ca. 16.

(*h*) Mitchell *v.* Lapage, Holt, N. P. Ca. 253. But see Boulton *v.* Jones, 2 H. & N. 564.

[1] See *ante*, 440, 441, and notes.

A mortgage was executed by P. in 1857 for $8,000, on real estate in favor of L. and C., commission merchants, for the purpose of securing and covering advances made and to be made by said commercial house, for the benefit of the plantation of P. After the execution of the mortgage, the commercial house of L. and C. was changed by the addition of new parties, and styled L., C. & Co. In 1862, P. executed three promissory notes in favor of the new firm of L., C. & Co. The holder of the notes brought suit to recover the amount, and claimed the benefit of the mortgage in favor of the old firm, executed in 1857: *Held*, that the addition of another party in the firm dissolved the old firm, in whose favor the mortgage was executed, and created a new firm, in whose favor the notes were given, and the new firm could not avail themselves of the mortgage given in favor of the old firm. Abat *v.* Penny, 19 La Ann. 289.

(*i*) Moore *v.* Hill, Peake, Add. Cases, 10.

previously entered into by him. Thus, as was pointed out in the seventh chapter of the first book (*k*), a person who is surety to a firm is discharged from his suretyship, for the future, by a change amongst its members, and cannot, therefore, be sued either by the old or by the new partners for any default of the principal debtor occurring subsequently to the change. Again, if a person enters into a contract with a firm, and that contract is of a purely personal character, to be performed by the individuals who have entered into it, and not by any one else, a change in the firm may operate as a dissolution of the contract, so that neither the new nor the old partners can sue in respect of any alleged breach which may have occurred since the change took place. An illustration of this is afforded by Robson *v.* Drummond. (*l*) In that case A. and B. were partners as coachmakers. C., who knew nothing of B., entered into a contract with A. for the hire of a carriage for five years, at so much a year, and A. undertook to keep the carriage in proper order for the whole five years. Before the five years were out, A. and B. dissolved partnership, and A. assigned the carriage and the benefit of the contract relating to it to B. B. gave C. notice of the dissolution and arrangement respecting the carriage; but C. declined to continue the contract with B., and returned the carriage. An action was then brought by A. and B. against C., for not performing the contract; but it was held that the action would not lie, the contract having been with A. alone, to be performed by him personally, and he having disabled himself from continuing to perform it on his part.[1] In Stevens *v.* Benning (*m*) the same principle was *applied to a contract between an author and a firm of publishers; and it was held that the contract was one of a personal character, and that consequently the author was discharged from it by a change in the firm, and an assignment of the benefit of the contract to persons of whom the author knew nothing.

Robson *v.* Drummond.

Stevens *v.* Benning.

*490

Secondly, with respect to changes caused by death. Before the Judicature acts, when a partner died in the lifetime of any one or more of his co-partners, all actions brought in respect of any contract entered into by or on behalf of the firm before his death, must have been brought by or against the surviv-

Effect of death.

(*k*) *Ante*, p. 213.
(*l*) 2 B. & Ad. 303.
(*m*) 1 K & J. 168, and 6 DeG. M. & G. 223.
[1] See *ante*, 417, note.

ing members of the firm, and by or against them alone; for the representatives of the deceased partner could neither sue nor be sued at law in respect of any such contract. (*n*)[1] So an action for the conversion of partnership goods must have been brought by the surviving partners. (*o*)

It followed from the above rule that the last surviving partner, or if he was dead his legal personal representative, was the proper person to sue and be sued at law in respect of the debts and engagements of the firm. (*p*)

Actions by and against surviving partners.

These rules, however, can be no longer relied upon, except where the obligation sought to be enforced is joint in equity as well as at law. Wherever it is several as well as joint (*q*), an action may, it is apprehended, be brought by or against the surviving partners and the executors or administrators of the deceased partner. (*r*)

Lastly, with respect to changes caused by bankruptcy. Previously to the Bankruptcy act, 1869, if a party was bankrupt, his assignees were required to join in his stead in any action in which, had no bankruptcy intervened, the bankrupt *himself would have been necessarily joined as a plaintiff. (*s*) If the assignees declined to join, the solvent partners were entitled to make use of their names upon indemnifying them against the costs of the action. (*t*) If all the partners were bankrupt, any action which it would have been necessary to bring in the names of all the partners, if bankruptcy had not intervened, must have been brought by their assignees. (*u*) But this

Effect of bankruptcy.

*491

(*n*) Dixon *v.* Hammond, 2 B. & A. 310, which shows that an agent of the firm must account to the surviving partners. See, too, Martin *v.* Crompe, 1 Ld. Raym. 340, and 2 Salk. 444; and Webber *v.* Tyvill, 2 Wms. Saund. 121, *e*. Formerly this was otherwise, see the authorities collected in Buckley *v.* Barber, 6 Ex. 178.

[1] See *post*, SURVIVORSHIP, p. 665, and note.

(*o*) Kemp. *v.* Andrews, Carth. 170; but see Buckley *v.* Barber, 6 Ex. 164. An indictment for stealing them may be preferred by the surviving partners, and the next of kin of the deceased partner. R. *v.* Gaby, Russ. & Ry. 178; R. *v.* Scott, ib. 13.

(*p*) Richards *v.* Heather, 1 B. & A. 29; Calder *v.* Rutherford, 3 Brod. & Bing. 302.

(*q*) As to which, see *ante*, p. 369.

(*r*) Ord. xvi. rr. 1, 3, 5, 7.

(*s*) Eckhardt *v.* Wilson, 8 T. R. 140; Thomason *v.* Frere, 10 East, 418; Graham *v.* Robertson, 2 T. R. 282.

(*t*) Whitehead *v.* Hughes, 2 Cr. & M. 318.

(*u*) See Ray *v.* Davies, 8 Taunt. 134. The trustee of a firm may sue for debts owing to the members thereof individually. Stonehouse *v.* De Silva, 3 Camp. 399; Hancock *v.* Haywood, 3 T. R. 433; Scott *v.* Franklin, 15 East, 428.

was subject to the qualification that bankrupts, whether partners or not, might sue in their own names as trustees for other people. (*x*) By the Bankruptcy act, 1869, the trustee of a bankrupt partner is not required to join the solvent partners in suing on a joint contract made with the firm (*y*); but the trustee may join in the action if authorized to do so by the Bankruptcy Court (*z*); and his joinder is necessary where an act of the bankrupt is sought to be impeached. (*a*)

Actions against bankrupts.

As regards actions against a firm, one or more of the members of which have become bankrupt, it need hardly be observed that there is no remedy by action against trustees in respect of liabilities of the bankrupt they represent. The only remedy is by proof against his estate, or by proof and by an action against him if he has not obtained his order of discharge, or if his order of discharge is no bar. When, therefore, it is desired to recover a debt due from a firm, and all the partners are bankrupt, an action is not the remedy unless the partners have not obtained their discharge, or unless the debt could not have been proved in bankruptcy. If, however, some only of the partners are bankrupt, the solvent partners only need be sued (*b*);[1] and the Court of Bankruptcy can restrain an action against the bankrupt partner. (*c*)

SECTION II.—ACTIONS BY AND AGAINST COMPANIES.

*492 *The rights and obligations of companies as between themselves and non-members, are determined by the principles examined in the preceding chapters of the present book. What contracts are to be regarded as contracts of a company, what frauds and torts are imputable to it, and what to its directors or agents individually, are questions which have already been investigated. In the present section it is proposed to advert to the mode in which companies can sue and be sued. (*d*)

(*x*) See Boddington *v.* Castelli, 1 E. & B. 66; Winch *v.* Keeley, 1 T. R. 619.

(*y*) 32 & 33 Vict. c. 71, § 112.

(*z*) Ibid. § 105.

(*a*) See Heilbut *v.* Nevill, L. R. 5 C. P. 478.

(*b*) 32 & 33 Vict. c. 71, § 112. Hawkins *v.* Ramsbottom, 6 Taunt. 178.

[1] If while an action is pending against two partners, one of them is adjudged a bankrupt, and the action continued as to him until the question of his discharge is determined, the action may still proceed as to the other. Hogendobler *v.* Lyon, 12 Kan. 276.

(*c*) See *Ex parte* Mills, 6 Ch. 594. It cannot restrain an action against the solvent partners, *Ex parte* Isaac, 6 Ch. 58.

(*d*) See the next section as to pro-

(*a*) *Incorporated companies.*

An incorporated company, whether it is incorporated by charter, special act of Parliament, or registration, must sue and be sued by its corporate name (*e*);[1] and as a general rule an incorporated company cannot sue or be sued in respect of any contract entered into or act done prior to its incorporation. (*f*) But to this rule there are statutory exceptions, and by the Companies act, 1862, a company registered but not formed under it may apparently sue and be sued in its corporate name in respect of such matters as it might have sued or have been sued for if no registration had taken place. (*g*)

Actions by and against incorporated companies.

*The law relating to actions by and against companies which are being wound up, will be examined in that portion of the treatise which relates to the winding up of companies; but it may be observed here generally, that when a company registered under the Companies act, 1862, is being wound up, actions, whether by or against it, must be brought in its registered name (*h*), and not as under the Winding-up acts of 1848–9, in the name of the official manager or liquidator. (*i*) *493

Actions by and against companies being wound up.

ceedings against individual members on judgments against companies.

(*e*) See *Re* Hodges, 8 Ch. 204; Fell *v.* Burchett, 7 E. & B. 537, where a shareholder in a registered company was unsuccessfully sued. Compare Barton *v.* Hutchinson, 2 Car. & K. 712. The company should be sued in its corporate name simply. Pilbrow *v.* Pilbrow's Atmospheric Rail. Co., 3 C. B. 730.

[1] See, generally, Ang. & Ames on Corp. Chap. XI.

(*f*) See *ante*, p. 394, and the next note.

(*g*) This it is conceived is the general effect of 25 & 26 Vict. c. 89, §§ 193–195. In Hull Flax Co. *v.* Wellesley, 6 H. & N. 38, calls made before registration were sued for afterwards in the company's registered name, and were recovered. So in Queensbury Industrial Society *v.* Pickles, L. R. 1 Ex. 1, where a society registered under 25 & 26 Vict. c. 87, recovered in its registered name a debt owing to it before registration; and compare that case with Dean *v.* Mellard, 15 C. B. N. S. 19, and Linton *v.* Blakeney Industrial Society, 3 H. & C. 853, where societies registered under the same act were held not liable to be sued in their registered names in respect of debts contracted before registration. The only general conclusion to be drawn from these cases is that the exact language of each act must be closely attended to. See, further, Lanyon *v.* Smith, 3 Best & Sm. 938.

(*h*) 25 & 26 Vict. c. 89, § 95.

(*i*) 11 & 12 Vict. c. 45, § 50, *et seq.* There, were, however, some cases in

Security for costs when company sues.

A foreign company (*k*), and also a limited company if there is reason to suppose that its assets will be insufficient to pay the defendant's costs, can be compelled to give security for the costs of actions instituted by it. (*l*) An affidavit, showing reasonable ground for supposing that the company cannot pay the costs, will, if unanswered, induce the court to order security to be given. (*m*) The security, which can be insisted upon, depends on the nature of the case. (*n*) In injunction actions a limited company's undertaking to abide by such order as the court may make as to damages is not sufficient. (*o*) An unlimited company, although it is insolvent and being wound up, cannot be ordered to give security for costs. (*p*)

Actions by the Attorney-General.

Actions by the Attorney-General to restrain companies *494 from exceeding their statutory powers may be brought in cases where, owing to the absence of any special injury to a particular individual, an action by a stranger would not lie. (*q*)

Actions after amalgamation.

Where companies are amalgamated by act of Parliament, it is generally enacted that actions pending against either company may be continued against the amalgamated company, and in such cases it is only necessary to state the amalgamation on the proceedings. (*r*)

which he could not sue. See, as to this, *Re* Weiss, 15 C. B. 331; Russell *v.* Croysdill, 11 Ex. 123.

(*k*) Kilkenny, &c. Rail. Co. *v.* Fielden, 6 Ex. 81; Limerick, &c. Rail. Co. v. Fraser, 4 Bing. 394.

(*l*) Western of Canada Oil Co. *v.* Walker, 10 Ch. 628; 25 & 26 Vict. c. 89, § 69. City of Moscow Gas Co. *v.* International Financial Soc. 7 Ch. 225; Washoe Mining Co. *v.* Ferguson, 2 Eq. 371. The section, however, did not apply to pure cross-suits; Accidental and Marine Insur. Co. *v.* Mercati, 3 Eq. 200; nor to petitions of appeal, *Re* Marine Estates Co. Jan. 1867, L. J. J. See Northampton Coal, &c. Co. *v.* Midland Wagon Co. 7 Ch. D. 500.

(*m*) Southampton Steamboat Co. *v.* Rawlins, 9 Jur. N. S. 887, and 2 N. R. 544, in which Caillaud's, &c. Co. *v.* Caillaud, 26 Beav. 427, *contra*, was not followed.

(*n*) Imperial Bank of China *v.* Bank of Hindustan, 1 Ch. 437, modifying Australian Steamship Co. 4 K. & J. 407.

(*o*) Anglo-Danubian Co. *v.* Rogerson, 3 N. R. 185; and 10 Jur. N. S. 87.

(*p*) United Ports Co. *v.* Hill, L. R. 5 Q. B. 395.

(*q*) See Attorney-Gen. *v.* Great Northern Rail. Co. 1 Dr. & Sm. 154, and Ware *v.* Regent's Canal Co. 3 DeG. & J. 212. It may be inferred from the judgment in the latter case that a definite injury to the public need not be proved in order to support such an action.

(*r*) See 26 & 27 Vict. c. 92, § 43.

Incorporated companies act in legal proceedings by their agents, appointed under seal. (*s*)

As between the parties to an action instituted by an incorporated company, a retainer under seal of the solicitor acting for it will, if necessary, be presumed (*t*); but in an action by that solicitor against the company for his costs, it is questionable whether a proper retainer under seal must not be proved (*u*), if such retainer is essential, which depends on the nature of the company. (*v*)

Retainer under seal when presumed.

The directors of a company have, it is conceived, power to institute and defend actions and suits in the name of the company, and to do for it whatever may be necessary, having regard to the ordinary course of legal proceedings. It has been held that a bond given by an incorporated company as a security for costs in an action to which it is party, and in the ordinary course, is not *ultra vires*. (*x*)

*In a case where a company was restrained from infringing a patent the directors were ordered to pay the costs. (*y*) *495

In an action by or against an incorporated company, the directors may be examined on interrogatories. (*z*)

Directors may be interrogated.

(*b*) *Companies empowered to sue and be sued.*

Cost-book mining companies (*a*), banking companies governed by the 7 Geo. 4, c. 46 (extended by 27 & 28 Vict. c. 32), and companies formed under the Letters Patent act, 7 Wm 4. & 1 Vict. c. 73 (*b*), are empowered by

Statutory enactments enabling companies to sue and be sued.

(*s*) 32 & 33 Vict. c. 71, § 80, cl. 7. Compare 25 & 26 Vict. c. 89, § 64. See, as to the service of writs on companies, Pilbrow *v.* Pilbrow's Atmospheric, &c. Co. 3 C. B. 730; and as to companies registered under the Companies Act, 1862, see 25 & 26 Vict. c. 89, § 62, and Towne *v.* London and Limerick Steamship Co. 5 C. B. N. S. 730; and as to foreign companies, see Ingate *v.* Lloyd, Austriaco, 4 C. B. N. S. 704.

(*t*) Thames Haven Dock Co. *v.* Hall, 5 Man. & Gr. 274.

(*u*) Compare Arnold *v.* Mayor of Poole, 4 Man. & Gr. 860, with Haigh v. North Bierley Union, E. B. & E. 873.

(*v*) R. *v.* Cumberland, 5 Ra. Ca. 332. See, as to companies registered under the act of 1862, § 37.

(*x*) Young *v.* Brompton Waterw. Co. 1 Best & Sm. 675. See, as to references to arbitration, Faviell *v.* Eastern Counties Rail. Co. 3 Ex. 344.

(*y*) See Betts *v.* De Vitre, 5 N. R. 165, V.-C. Wood.

(*z*) Ord. xxxi. rr. 1 and 4.

(*a*) See 32 & 33 Vict. c. 19, § 13; but this enactment only applies to calls and to companies subject to the Jurisdiction of the Stannary Courts.

(*b*) Industrial and Provident Societies were empowered to sue and be sued by

statute to sue and be sued in the name of an individual appointed to sue and be sued on their behalf; and there is a large number of private acts (*c*) enabling particular companies to sue and be sued in like manner. It is customary to designate such companies as *companies empowered to sue and be sued* (*d*), and amongst them will be found most existing unincorporated companies formed, for other than mining purposes, before the passing of the Joint-stock companies registration act of 1844.

Who are represented by public officers.

A company which, without being incorporated, is empowered to sue and be sued by a public officer, is sufficiently represented by that officer in all actions between the company as a body on the one side and a stranger on the other. (*e*)

But, as will be seen hereafter, a public officer does not represent one *496 * set of shareholders as against another set; for he is only the representative of the shareholders as a body.

Whether public officers must be sued.

It does not follow that, because a company is empowered by some private statute to sue and be sued by a public officer, therefore a creditor may not sue any one or more of the shareholders. Creditors are not deprived of their common law rights by an act of Parliament which is consistent with their retention of those rights; and there are several instances in which it has been held that, although a creditor might sue the public officer, it was not incumbent on him to do so. (*f*)

Powers of public officers.

Another observation to be made with respect to these private acts is, that the public officers created by them have no powers except those expressly conferred upon them. Where, therefore, a company was empowered to sue and be sued in the name of its secretary, and to institute actions and suits in his name, it was held that he had no power to petition on behalf of the

a public officer by 17 & 18 Vict. c. 25, but this act was repealed by 25 & 26 Vict. c. 87, § 1. See, as to the public officers of such societies, Burton *v.* Tannahill, 5 E. & B. 797.

(*c*) There are also some colonial statutes to the same effect. The validity of one of them was unsuccessfully disputed in Bank of Australasia *v.* Nias, 16 A. B. 717. See, too, Bank of Australasia *v.* Harding, 9 C. B. 661, and Kelsall *v.* Marshall, 1 C. B. N. S. 241.

(*d*) A good account of the progress of legislation relating to these companies will be found in Van Sandau *v.* Moore, 1 Russ. 441.

(*e*) See Pendlebury *v.* Walker, 4 Y. & C. Ex. 424; Meux *v.* Maltby, 2 Swanst. 277.

(*f*) Blewitt *v.* Gordon, 6 Jur. 825, *per* Coleridge, J.; S. C. 1 Dowl. N. S. 815; Pentland *v.* Gibson, 1 Alc. & Nap. 310; Beech *v.* Eyre, 5 Man. & Gr. 415.

company for a commission of bankruptcy against one of its debtors. (*g*)

Questions sometimes arise as to whether a public officer can sue or be sued in respect of a contract not expressly entered into with the company. These questions will all be found to turn on the language of the act applicable to the company to which the questions relate; but speaking generally, it may be said that a public officer may sue or be sued upon contracts which are contracts of the company in point of substance, although not in point of form. (*h*)

On what contracts public officers may sue and be sued.

A promissory note payable to the order of a person who is in fact a trustee for a company empowered to sue by a public * officer ought, if unindorsed, to be sued upon by the payee and not by the public officer. (*i*)

*497 Bills and notes.

A public officer may sue for a libel on the company represented by him, although it is not a corporate body. (*k*)

Libels.

By far the greater number of decisions to be met with in the books relating to public officers, have turned upon the Banking Act of 7 Geo. 4, and to these decisions, so far as they relate to actions between companies governed by the act on the one hand, and strangers on the other, it is now proposed to direct the reader's attention.

Public officers of banking companies.

The Banking act of 7 Geo. 4, c. 46 (*l*) has been decided to require imperatively, that all actions by or against companies governed by it, shall by brought by or against their public officers, and not otherwise. For this act does not, like those in Blewitt *v.* Gordon (*m*) and other cases of that class, leave the obligations and liabilities of the partners the same as they would

Decisions on 7 Geo. 4, c. 46.

(*g*) Guthrie *v.* Fisk, 3 B. & C. 178; and see *Ex parte* Guthrie, 1 Gl. & Jam. 245. Some of the older acts only empower companies to sue by their public officers, and are altogether silent about their being sued. See the act which was in question in Meux *v.* Maltby, 2 Swanst. 277. More modern acts are much more comprehensive in their terms.

(*h*) Soulby *v.* Smith, 3 B. & Ad. 929; Smith *v.* Goldsworthy, 4 Q. B. 430; Wills *v.* Sutherland, 4 Ex. 211, and on appeal, 5 Ex. 715; Skinner *v.* Lambert, 4 Man. & Gr. 477. See, also, Cobham *v.* Holcombe, 8 C. B. N. S. 815.

(*i*) See M'Dowell *v.* Doyle, 7 Ir. Com. Law Rep. 598.

(*k*) Williams *v.* Beaumont, 10 Bing. 260.

(*l*) Amended by 1 & 2 Vict. c. 96, 3 & 4 Vict. c. 11, and 27 & 28 Vict. c. 32.

(*m*) 6 Jur 825, *ante*, p, 496, note (*f*).

be at common law, but materially modifies them; and effect cannot be given to the various provisions of the act if actions are allowed to be brought by or against the company otherwise than in the manner prescribed by the act itself. (*n*)

Even if there were no public officer, it was doubtful whether any action could be brought against the company until one was appointed; and whether, therefore, a person desirous of suing the company must not, before he could bring an action, compel the company to appoint an officer whereby it might be sued. (*o*) But it was held that a person may be convicted of stealing the property of a banking company, governed by 7 Geo. 4, c. 46, although *498 there was no public officer. The property in * such a case should be stated to belong to one of the shareholders and others. (*p*) Probably the non-existence of a public officer would now enable a creditor to sue the company in its mercantile name; or to sue some of the members on behalf of the whole company. (*q*)

The fact that the company has stopped payment does not prevent it from suing and being sued by its public officer (*r*); and if a banking company changes its name, the public officer of the new company represents the old company. (*s*) Whatever number of public officers a company may have, one only should sue or be sued. (*t*) The bankruptcy of a public officer does not prevent his being sued as such. (*u*)

The change of a public officer *pendente lite* does not affect the action. If an action is brought by a public officer, the fact that judgment is entered up in his name, after he has been removed from office, does not entitle the defendant to set aside the judgment, and the subsequent proceedings upon it; but leave will be given to enter on the roll *nunc pro tunc*, a

Effect of changing public officer.

(*n*) Steward *v.* Greaves, 10 M. & W. 711; Chapman *v.* Milvain, 5 Ex. 61. Compare Robertson *v.* Sheward, 1 Man. & Gr. 511. See as to laying intent to defraud in indictments for forgery, R. *v.* Carter, 1 Car. & K. 741; R. *v.* Beard, 8 Car & P. 143; R. *v.* James, 7 Car. & P. 553; and R. *v.* Burgiss, ib. 490; and as to an affidavit to hold to bail, Spencer *v.* Newton, 6 A. & E. 630. The Industrial Provident Societies act, 17 & 18 Vict. c. 25, was also imperative, Burton *v.* Tannahill, 5 E. & B. 797.

(*o*) See Steward *v.* Greaves, 10 M. & W. 711.

(*p*) R. *v.* Pritchard, 7 Jur. N. S. 557.

(*q*) See Ord. xvi. rr. 9 and 10.

(*r*) Davidson *v.* Cooper, 11 M. & W. 778; Needham *v.* Law, ib. 400.

(*s*) Wilson *v.* Craven, 8 M. & W. 584.

(*t*) Holmes *v.* Binney, 4 Bing. N. C. 454.

(*u*) Steward *v.* Dunn, 11 M. & W. 63.

suggestion of the plaintiff's removal and the appointment of a fresh officer, and to amend the judgment and writ of execution by the insertion of the name of the new officer. (*x*) If an action is brought by a public officer, and he dies or is removed, and no steps are taken by his successor to prosecute the action, it may, after the lapse of the usual time, be dismissed with costs for want of prosecution. (*y*)

Action by a person who assumes to be a public officer.

It is to be observed, that if a person who is not a public officer, sues as if he were, the company which he assumes to represent is not a party to the action, and consequently will not be affected by the judgment in it; hence the fact, that the plaintiff is what he pretends to be, is material and *traversable (*z*), and declarations and affidavits by public officers have been held bad for not stating with sufficient precision the character in which the plaintiff on the record was suing, and the existence of the company he assumed to represent (*a*) At the same time, unless the fact that the plaintiff is suing on behalf of a company having a public officer appears on the pleadings, or unless the defendant raises the objection that the plaintiff is so suing, so as to put that fact in issue, it will not be material that the action is brought on behalf of a banking company, subject to the statute of 7 Geo. 4, c. 46, by a person not appearing to be its public officer. (*b*) *499

Company must have begun business.

Although, as has been seen, a public officer may sue on behalf of a company which has stopped payment, there can be no public officer under the 7 Geo. 4, c. 46, of a company which has not begun to carry on the business of bankers under that act. (*c*)

(*x*) See Webb *v.* Taylor 8 Jur. 39; Todd *v.* Wright, 11 Jur. 471; and as to the proper mode of entering the suggestion on the roll, see Barnewall *v.* Sutherland, 9 C. B. 380, and Paterson *v.* Ironside, 14 Jur. 722, note.

(*y*) Burmester *v.* Von Stentz, 23 Beav. 32.

(*z*) See Barnewall *v.* Sutherland, 9 C. B. 380; Steward *v.* Dunn, 11 M. & W. 63.

(*a*) See Esdaile *v.* Maclean, 15 M. & W. 277; McIntyre *v.* Miller, 13 ib. 725; Fletcher *v.* Crosbie, 9 ib. 252; Christie *v.* Peart, 7 ib. 491; Spiller *v.* Johnson, 6 ib. 570; Davidson *v.* Bower, 4 Man. & Gr. 626. See as to affidavits *Ex parte* Torkington, 9 Ch. 298; *Ex parte* Lowenthal, ib. 324.

(*b*) Robinson *v.* Sheward, 1 Man. & Gr. 511.

(*c*) Roe *v.* Fuller, 7 Ex. 220; Steward *v.* Dunn, 11 M. & W. 63; Fletcher *v.* Crosbie, 9 M. & W. 252; and compare Davidson *v.* Bower, 4 Man. & Gr. 626.

In an action against a public officer as a nominal defendant, he may deny that he fills the office he is assumed to fill. (*d*) But this defense will be of no avail, if the only evidence to support it is that the company has ceased to carry on business. (*e*) A plea of the bankruptcy of a person sued as a public officer will not be allowed to stand, if the plaintiff will give an undertaking not to issue execution against the person or property of the defendant himself. (*f*)

Plea that person sued is not a public officer.

Under the 7 Geo. 4, c. 46, public officers are appointed by their respective companies; and returns are required to be *made to the Stamp Office, in the form given in the schedule to the act, stating the names and places of abode of the persons so appointed. (*g*) The most formal evidence of the appointment of a particular individual to be a public officer of a company, is the return made by the company to the Stamp Office in pursuance of the statute. But it has been frequently decided that the appointment may be proved otherwise than by such returns, *e.g.*, by parol testimony, and that an informality in a return is of no importance, if satisfactory evidence *aliunde* of the alleged appointment is forthcoming. (*h*)

Appointment of public officers under 7 Geo. 4, c. 46.

*500

It has been decided that, if a public officer brings an action, he may be interrogated by the defendant. (*i*)

Interrogating public officer.

The law relating to public officers of companies formed under the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73, will be found in §§ 3, 13, 22, 23, 24, and 25 of that act. There have been no decisions upon it bearing upon the present subject, but it seems clear that a company governed by it must sue and be sued by its public officer, if there is one; but if there is not, then any member of the company may be sued.

Public officers of companies governed by 7 Wm. 4 & 1 Vict. c. 73.

(3). *Other unincorporated companies.*

Unincorporated companies not empowered by statute to sue and be sued by a public officer, must sue and be sued like ordinary part-

(*d*) Qu. whether the plea of denial must not be supported by affidavit, Wood *v.* Marston, 7 Dowl. 865.

(*e*) See Needham *v.* Law, 11 M. & W. 400; Davidson *v.* Cooper, ib. 778.

(*f*) Steward *v.* Dunn, 11 M. & W. 63; Wood *v.* Marston, 7 Dowl. 865.

(*g*) 7 Geo. 4, c. 46, § 4.

(*h*) Edwards *v.* Buchanan, 3 B. & Ad. 788; R. *v.* Carter, 1 Car. & K. 741; R. *v.* Beard, 8 C. & P. 143; R. *v.* James, 7 C. & P. 553.

(*i*) M'Kenna *v.* Rolt, 3 Jur. N. S. 714, Ex.

nerships.[1] Consequently, before the passing of the Judicature acts, it was extremely difficult for such companies to sue at law at all, and various unsuccessful attempts were made to avoid the necessity of joining all the proper persons as co-plaintiffs. (*j*) But even as the law stood before * those acts, there was no great difficulty in the way of a *501 creditor who sought to obtain payment of a debt owing by the company. For although if he did not sue all the shareholders who in strictness ought to have been sued, he might have been met by a plea in abatement, yet inasmuch as such a plea was of no avail unless it disclosed the names of *all* the persons who ought to have been made defendants, and unless it was verified by affidavit, and unless it was strictly proved if issue was taken upon it, it was practically impossible for a member of a large company seriously to obstruct or embarrass a creditor by having recourse to a plea in abatement, founded on the non-joinder of the other shareholders. (*k*)

Difficulty of suing before the Judicature Acts.

The alterations made in the law respecting parties to actions by the Judicature acts and rules, have, however, removed the difficulty in the way of unincorporated companies suing; for an action may now be maintained by or against some of the shareholders on behalf of themselves and others having a common interest in the action (*l*); or, where no change has occurred amongst the shareholders, an action may be brought in the name of the company. (*m*)

Alterations made by the Judicature Acts.

Actions in this form will have to be adverted to hereafter when treating of actions between companies and their members; but it may be observed here that even before the Judicature acts, suits in equity by some

Actions by some on behalf of themselves and others.

[1] See *ante*, 467, 468, and notes.

(*j*) See as to all such attempts, Radenhurst *v.* Bates, 3 Bing. 470; and as to agreements to enable actions to be brought by the chairman for the time being of the directors of a company, Hall *v.* Bainbridge, 1 Man. & Gr. 42; by the directors for the time being of a company, Phelps *v.* Lyle, 10 A. & E. 113; Woolner *v.* Toby, 4 Ra. Ca. 713; by the purser for the time being of a cost-book company, Hybart *v.* Parker, 4 C. B. N. S. 209; by the managers of a mutual marine insurance society, Gray *v.* Pearson, L. R. 5 C. P. 568; Corner *v.* Maxwell-Irwin, Ir. R. 10 C. L. 354. On the other hand a contract made with an agent of a company might be sued on by the agent, unless the contract was on the face of it made with the company through its agent. See Clay *v.* Southern, 7 Ex. 717, and so it may now.

(*k*) Crellin *v.* Calvert, and Crellin *v.* Brook, 14 M. & W. 11, may be referred to as illustrating the above observation.

(*l*) Ord. xvi. r. 9.

(*m*) Ib. r. 10. See *ante*, p. 468.

persons on behalf of themselves and others having a common interest, were frequently instituted to enforce equitable rights, *e.g.*, to enforce the rights of the mortgagees of a company's undertaking (*n*) to rescind a contract for fraud (*o*); to enforce specific performance of an agreement (*p*); to obtain an account (*q*), or an injunction. (*r*)

Some on behalf when firm is sued.

*502 *So a suit against some of the members of a numerous partnership or unincorporated company might be maintained to enforce an equitable right if it was a right against the whole body, and one which all the members thereof had a common interest in opposing. (*s*) But suits in this form could not be maintained to enforce purely legal rights, on the ground that it was inconvenient to sue at law. (*t*)

Now actions in this form are maintainable in all the divisions of the High Court. Such actions, however, are occasionally attended with inconvenience, for although judgment may be obtained, it may be found impracticable to enforce it.

Meux v. Maltby.

The case of Meux *v.* Maltby (*u*) illustrates this. A suit was there instituted against the treasurer and the directors of a company, to obtain the benefit of an agreement made with the plaintiff by the former owner of property which had become vested in the company. The agreement was an agreement for a lease, and the court made a decree in the plaintiff's favor, but found itself unable to decree the execution of any lease to him. The defendants had no power to convey the legal estate in the land, and all the court could do was to declare the plaintiff entitled to a lease, and to restrain the officer from bringing any action to disturb the plaintiff's possession.

(*n*) Tripp *v.* Chard Rail. Co. 11 Ha. 241.

(*o*) Small *v.* Attwood, Younge, 457, *et seq.*; Fenn *v.* Craig, 3 Y. & C. Ex. 213.

(*p*) Clay *v.* Rufford, 8 Ha. 281; and see Douglas *v.* Horsfall, 2 Sim. & Stu. 184.

(*q*) Gordon *v.* Pym, 3 Ha. 223.

(*r*) Lund *v.* Blanshard, 4 ib. 290.

(*s*) See Pare *v.* Clegg, 29 Beav. 589, where a suit was instituted by the creditor of a benefit society against its trustees, and one of each class of its members. See, also, Adair *v.* The New River Co. 11 Ves. 429; Meux *v.* Maltby, 2 Swanst. 277; Fenn *v.* Craig, 3 Y. & C. Ex. 216; Cullen *v.* Duke of Queensberry, 1 Bro. C. C. 101, and 1 Bro. P. C. 396; The City of London *v.* Richmond, 2 Vern. 421.

(*t*) Allison *v.* Herring, 9 Sim. 583.

(*u*) 2 Swanst. 277. See, too, Lund *v.* Blanshard, 4 Ha. 290, where an injunction restraining a defendant from suing the plaintiffs, was held not to preclude the defendant from suing other persons on behalf of whom the plaintiffs filed their bill.

STANFORD UNIVERSITY LAW LIBRARY

CT ALP TJt4
A treatise on the law of partn
Stanford Law Library

3 6105 044 786 718